CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1938

No. 195

SOCONY-VACUUM OIL COMPANY, INC.,
PETITIONER,

vs.

HERBERT A. SMITH, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 11, 1938.

CERTIORARI GRANTED OCTOBER 10, 1938.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1938

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SOCONY-VACUUM OIL COMPANY, INC., PETITIONER,

vs.

HERBERT A. SMITH, JR.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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[fol. 1]

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L. 62-165

HERBERT A. SMITH, JR., Plaintiff,

against

SOCONY VACUUM OIL COMPANY, INC., Defendant

STATEMENT

This action was commenced in the United States District Court for the Southern District of New York by the service of a summons and complaint on the 14th day of October, 1935.

The names of the parties are as set forth in the caption above and there has been no change of parties or attorneys since the commencement of this action.

The defendant filed its answer on the 4th day of November, 1935.

There was no arrest of the defendant, no bail taken and no property attached or arrested.

No questions were referred to a Commissioner.

The trial was held before Hon. William Bondy and a jury on the 8th, 9th, 10th, 11th and 14th of June, 1937.

Verdicts were rendered by the jury in favor of the plaintiff and against the defendant for $5000.00 on the first cause of action, and $535.00 on the second cause of action.

Judgment was entered in accordance therewith on the 22nd day of June, 1937.

Appeal was taken on the 2nd day of August, 1937.

[fol. 2] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

SUMMONS

To the Above-Named Defendant:

You are hereby summoned to answer the complaint in this action, and to serve a copy of your answer, or, if the

complaint is not served with this summons, to serve a notice of appearance on the plaintiff's attorney within twenty days after the service of this summons, exclusive of the day of service. In case of your failure to appear or answer, judgment will be taken against you by default for the relief demanded in the complaint.

Witness, the Honorable, John C. Knox, Judge of the District Court of the United States for the Southern District of New York at the City of New York, this 3rd day of October, A. D. 1935.

(Signed) Charles Weiser, Clerk.

George J. Engelman, Plaintiff's Attorney, Office and Post Office Address, 44 Whitehall Street, Borough of Manhattan, City of New York.

[fol. 3] In United States District Court, Southern District of New York

[Title omitted]

Complaint

Action Under Special Rule for Seamen to Sue Without Security and Prepayment of Fees for Enforcement of Laws of the United States, for the Protection of Health and Safety at Sea

The plaintiff, by George J. Engelman, his attorney, complaining of the defendant, alleges the following:

First. Upon information and belief, that at all the times hereinafter mentioned, the above named defendant was and now is a corporation organized and existing under and by virtue of the laws of the State of New York, and at all said times was and is doing business in the State of New York with an office for the regular transaction of business in the City of New York, State of New York.

Second. Upon information and belief, that at all the times hereinafter mentioned, the above named defendant was the owner of a certain vessel called the "Yankee Arrow."

Third. Upon information and belief that at all the times hereinafter mentioned the above named defendant char-

[fol. 4] tered, operated, managed, controlled, provisioned, manned, supplied and was in possession and control of the said steamship "Yankee Arrow."

Fourth. Upon information and belief that at all the times hereinafter mentioned and more particularly from on or about April 24, 1935, to on or about June 4, 1935, the plaintiff was in the employ of the defendant aboard the said steamship "Yankee Arrow" as a seaman (oiler).

Fifth. Upon information and belief that the defendant employed the plaintiff at all the times hereinafter mentioned and more particularly from on or about April 24, 1935, to on or about June 4, 1935, aboard the said steamship "Yankee Arrow" as a seaman (oiler).

Sixth. Upon information and belief, that it was the duty of the defendant to provide plaintiff with a seaworthy and safe vessel and appliances, and to keep the same in a safe condition; to furnish him with reasonably safe and seaworthy tools and appliances and keep the same in a proper state of repair; to furnish plaintiff with a sufficient number of competent co-employees and superior officers; to promulgate and enforce proper and safe rules for the safe conduct of said work, and to warn plaintiff of the dangers arising and to be encountered.

Seventh. That by reason of the negligent failure of the defendant, its agents, servants and employees and each of them to perform the foregoing duties and each of them on or about June 2, 1935, while the plaintiff acting under orders was engaged in the course of his duties in the engine room [fol. 5] aboard said steamship, without any fault on his part, in feeling the L. P. Journal he was caused to be precipitated and thrown into the crank pit and he thereby sustained serious and permanent personal injuries.

Eighth. Upon information and belief that the said injuries were directly caused through the negligence of the defendant, its agents, servants and employees, in failing and neglecting to provide the plaintiff with a safe place to work, in ordering and requiring the plaintiff to work under dangerous and improper conditions, in failing and neglecting to provide the plaintiff with safe, proper and seaworthy equipment and appliances, in failing and neglecting to make an inspection of the equipment and appliances in and about

the place where plaintiff was required to work and which he was required to use in the course of his work, and to keep the same in a safe condition and adequate state of repair; defendant, its agents, servants and employees were further negligent in failing and neglecting to properly superintend and supervise the maintenance and operation of said steamship and work in the engine room aboard said steamship, in failing and neglecting to provide plaintiff with safe and competent fellow-servants and superior officers, in failing and neglecting to warn plaintiff of the dangers impending and in failing and neglecting to take the customary steps to protect his person.

Ninth. That by reason of the said personal injuries plaintiff has been rendered sick, sore, lame and disabled, has suf- [fol. 6] fered, is suffering and will very probably suffer great pain, agony and mental anguish for a long time to come, has been and will be prevented from attending to his work for a long time to come, has lost and will lose sums of money which he otherwise would have earned, has been obliged to undergo medical care and attention, is still undergoing the same and will be obliged to submit to the same for a long time to come and may have to pay out large sums of money for medical care and attention, and upon information and belief, the plaintiff has been permanently injured all to his damage in the sum of Fifteen Thousand ($15,000) Dollars.

Tenth. That by virtue of the act of Congress, approved June 5th, 1920, known as the Merchant Marine Act, amendatory to the Act of Congress known as the Seaman's Act, of 1915, and by virtue of Section 20 of the said Act, the plaintiff is entitled to all of the favorable provisions of the various acts of Congress relating to the rights of railroad employees who are injured while engaged in interstate commerce and plaintiff is entitled to recover for the negligence of the persons in defendant's employ who caused or permitted such conditions to exist as aforesaid and whose negligence resulted in the injuries sustained.

Plaintiff for a second cause of action realleges and reiterates each and every allegation hereinbefore set forth and in addition thereto alleges:

Eleventh. After plaintiff sustained the injuries hereinbefore alleged, the master, officers and crew of said steamship

[fol. 7] failed and neglected to give the plaintiff prompt and proper medical care and attention, failed and neglected to provide him with the necessary comforts and conveniences, and by reason thereof his injuries were aggravated and made more serious and he suffered further pain and mental anguish and by reason thereof plaintiff has been further damaged in the sum of Ten Thousand ($10,000) Dollars.

Plaintiff for a third cause of action realleges and reiterates each and every allegation hereinbefore set forth and in addition thereto alleges:

Twelfth. That by reason of the said occurrence and the injuries plaintiff thereby sustained plaintiff has been and will be required to spend large sums of money for his maintenance and cure.

Wherefore, Plaintiff demands judgment against the defendant in the sum of Twenty-five Thousand ($25,000) Dollars as damages and the expenses for his maintenance and cure, together with the costs and disbursements of this action.

George J. Engelman, Attorney for Plaintiff, Office and P. O. Address, 44 Whitehall Street, Borough of Manhattan, City of New York.

[fol. 8] In United States District Court, Southern District of New York

[Title omitted]

Answer

The defendant, above named, by its attorney, Louis Mead Treadwell, answering the complaint of the plaintiff herein, alleges upon information and belief:

First. It denies each and every allegation contained in the paragraphs of the complaint herein numbered "Fourth" and "Fifth," except that it admits that the plaintiff herein was employed by the defendant as a seaman on board the S.S. "Yankee Arrow" during a portion of the time specified in said paragraphs.

Second. It denies each and every allegation contained in the paragraphs of the complaint herein numbered "Sixth," "Seventh," "Eighth," "Ninth," "Tenth," "Eleventh" and "Twelfth."

For a separate and distinct defense to each of the plaintiff's alleged causes of action set forth in the complaint herein, the defendant alleges upon information and belief:

Third. That there is another action pending and not determined between the same parties to this action for the [fol. 9] same causes of action that are alleged in the complaint herein, in the Supreme Court of the State of New York, County of Queens, a Court of competent jurisdiction.

For a first, separate and distinct defense to the plaintiff's alleged first and second causes of action set forth in the complaint herein, the defendant alleges upon information and belief:

Fourth. That if the plaintiff at the time or place mentioned in the complaint herein, or at any other time or place, was damaged or injured, said injuries or damages were caused or occasioned or in some manner contributed to by or through the carelessness or negligence of said plaintiff, and that said plaintiff was not injured or damaged in any manner or form by or through the carelessness or negligence of the defendant, its servants, agents, employees or any of them.

For a second, separate and distinct defense to the plaintiff's alleged first and second causes of action set forth in the complaint herein, the defendant alleges upon information and belief:

Fifth. That the plaintiff's alleged employment, at the time and on the occasion referred to in the complaint herein, had certain risks incidental thereto, which were obvious and well known to said plaintiff at all the times of said alleged employment, and that said risks were assumed by said plaintiff; that any injuries sustained by the plaintiff, at the [fol. 10] time or on the occasion referred to in the complaint, arose from and were caused, in whole or in part, or were contributed to by said risks of the plaintiff's alleged employment, all of which were taken and assumed by the

plaintiff at the time of entering upon said alleged employment and during the continuance thereof, and that said injuries were not caused or contributed to by any negligence, fault or want of care on the part of the defendant, its officers, servants, agents, employees or any of them.

For a separate and distinct defense to the plaintiff's alleged third cause of action set forth in the complaint herein, the defendant alleges upon information and belief:

Sixth. That if the plaintiff was or is entitled to any maintenance and/or cure for the alleged injuries and disability referred to in the complaint herein, the same have been and/or will be furnished to him by a United States Marine Hospital without cost or expense on his part.

Wherefore, the defendant demands judgment dismissing the complaint of the plaintiff herein, together with the costs of this action.

Louis Mead Treadwell, Attorney for Defendant, Office and Post Office Address: No. 26 Broadway, Borough of Manhattan, City and State of New York.

[fol. 11] In United States District Court, Southern District of New York

[Title omitted]

Demand for Bill of Particulars

Sir:

Please Take Notice that defendant Socony-Vacuum Oil Company, Inc., hereby demands that plaintiff serve upon the undersigned within five days from the date hereof a verified bill of particulars which shall, among other things, set forth:

I. As to the allegation contained in the paragraphs of the complaint numbered "Sixth" and "Seventh," that the plaintiff specify

A

(1) In what respect the vessel was unseaworthy and unsafe.

(2) In what respect the appliances were unseaworthy and unsafe.

(3) In what respect the tools were unseaworthy and unsafe.

(4) In what respect the vessel was out of repair.

(5) In what respect the appliances were out of repair.

[fol. 12] (6) In what respect the tools were out of repair.

B

(1) The number of co-employees of the plaintiff engaged with him in the work plaintiff claims he was performing at the time of the alleged accident.

(2) The number of and rank of the superior officers engaged with the plaintiff in the work he was performing.

(3) The title or grade of the immediate superior of the plaintiff and the person from whom he received directions or instructions as to when and where he should perform his work.

(4) Whether the co-employees or the officers were insufficient and incompetent, and if so in what respect.

C

(1) What rules are promulgated by the defendant.

(2) Which of said rules were not enforced.

(3) In what respect they were improper.

(4) In what respect they were unsafe.

(5) What rules should have been promulgated.

D

(1) What was the nature and character of the dangers arising out of and to be encountered in the kind of work in which the plaintiff claims he was engaged at the time of the accident, and of which of these dangers the defendant failed to warn the plaintiff.

II. As to the allegations contained in the paragraph of the complaint numbered "Seventh," that the plaintiff specify

[fol. 13] (1) The position of the vessel at the time of the alleged accident and whether the said vessel was in port or

at sea, and, if the latter, from what port she sailed and to what port she was bound.

(2) The nature, character and kind of work plaintiff was performing.

(3) The rank of the officer or person who was directing plaintiff's work or under whose orders or directions he was performing that work.

(4) The nature and kind of orders given to the plaintiff, whether they were general orders or detailed and specific orders.

(5) The approximate hour of the day or night the accident is claimed to have occurred.

III. As to the allegations contained in the paragraph of the complaint numbered "Seventh," that the plaintiff was precipitated and thrown into the crank pit, that the plaintiff specify

(1) The nature, character and cause of the force which precipitated and threw the plaintiff into the crank pit.

(2) Where the plaintiff claims he was standing at the time when he was precipitated or thrown.

(3) The distance in feet and inches the plaintiff claims he was precipitated or thrown.

(4) What act or omission on the part of the defendant [fol. 14] caused or occasioned the force to be exerted which precipitated or threw the plaintiff.

IV. As to the allegations contained in the paragraph of the complaint numbered "Eighth" that the plaintiff's injuries were directly caused through the negligence of the defendant, etc., that the plaintiff specify in what respect the said vessel, equipment, conditions and appliances were

(1) Unsafe.

(2) Defective, dangerous and improper.

(3) Out of repair.

(4) Unseaworthy.

(5) Omit 4/13/37 H. B. P.

(6) In what respect the defendant was negligent in permitting said condition to exist.

(7) What inspection it was the duty of the defendant to make and which it is alleged the defendant failed to make, or what steps the defendant should have taken to discover or remedy said defects.

(8) Omit 4/13/37 H. B. P.

(9) What work in the engine room the defendant failed to supervise.

(10) What customary steps to protect the plaintiff the defendant failed to take.

V. As to the allegations contained in the paragraphs of the complaint numbered "Seventh" and "Ninth," that the plaintiff specify

(1) The nature and extent of each and every injury al- [fol. 15] leged to have been sustained by the plaintiff as a result of the accident and which of said injuries he claims are permanent.

(2) Omit 4/13/37 H. B. P.

(3) If plaintiff was confined to a hospital by reason of his alleged injuries, that he specify the name and location of the hospital in which he claims he was so confined, giving the length of time that he was confined therein.

(4) The money paid for said hospital care and attention or necessarily incurred therefor.

(5) Where and for how long a time the plaintiff was confined to his bed by reason of the injuries he complained of.

(6) How long plaintiff claims to have been incapacitated and unable to work as a result of his injuries.

(7) What work, if any, the plaintiff has performed since the alleged accident and by whom he was so employed.

(8) Set out in detail each and every item of pecuniary damage or expense which it is claimed the plaintiff sustained as a result of his injuries.

VI. As to the allegations contained in the paragraph of the complaint numbered "Eleventh," that the plaintiff specify

(1) Which of the officers and which members of the crew failed to give the plaintiff prompt and proper medical care and attention.

[fol. 16] (2) The approximate hour of the accident and the approximate hour at which he received medical care and attention from the master.

(3) The nature, kind and character of the care and attention he did receive from the master.

(4) The particular respect in which this care and attention was improper.

(5) What necessary comforts and conveniences the plaintiff claims the defendant failed to provide.

(6) Which of said injuries were aggravated and made more serious.

Dated, New York, March 24, 1937.

Yours, etc., Louis Mead Treadwell, Attorney for Defendant, Office and Post Office Address, 26 Broadway, Borough of Manhattan, City and State of New York.

To George J. Engelman, Attorney for Plaintiff, Office and Post Office Address, 44 Whitehall Street, Borough of Manhattan, City and State of New York.

[fol. 17] In United States District Court, Southern District of New York

[Title omitted]

Plaintiff's Bill of Particulars

Plaintiff, answering defendant's demand for a bill of particulars, alleges the following particulars upon information and belief:

I. A. (1), (2), (3), (4), (5) and (6) In that she was not manned with safe and competent superiors, fellow-servants

and co-employees; in that a step plate, its appurtenances and appliances and in particular a bracket beneath the said step plate and connected with it, was worn, dangerous, defective and out of repair; in that the said bracket was loose, worn, out of place and otherwise defective; in that the bilge or crank pit in the vicinity of the L. P. column was open and unguarded and there was no guard rail or hand rail about the said bilge or crank pit; in that there were no adequate hand irons or grab irons about and in the vicinity of the place where plaintiff was working at the time of the occurrence and in that the step plate, its appurtenances and [fol. 18] appliances, the grab iron or hand iron in the vicinity of the place where plaintiff was working and the said L. P. column were slippery from grease and oil. Plaintiff reserves the right to further answer each and every one of the above demands after a discovery and inspection, more specifically plaintiff reserves the right to specify any defect in the construction of each and every one of the aforesaid appliances.

B. (1) Plaintiff was working alone at the time of the occurrence.

(2) None.

(3) The first assistant engineer.

(4) There was no insufficiency of co-employees and superior officers. Plaintiff's superior officers and co-employees were incompetent in that they caused, allowed, permitted and failed to remedy the negligent, dangerous and unsafe conditions hereinbefore and hereinafter alleged in this bill of particulars, failed and neglected to repair the dangerous and unsafe condition of the machinery, tools and appliances as hereinbefore and hereinafter alleged in this bill of particulars and ordered and required the plaintiff to work under the said negligent conditions and with the said machinery, tools and appliances.

C. (1), (2), (3) and (4) The defendant failed and neglected to promulgate and enforce any rules to protect the plaintiff's person from the dangerous, unsafe and unseaworthy condition of the ship's machinery, tools and appli- [fol. 19] ances as hereinbefore and hereinafter alleged in this bill of particulars and from the dangerous, unsafe and negligent conditions as hereinbefore and hereinafter alleged in this bill of particulars.

(5) Rules providing the plaintiff with a safe place to work; warning him of the dangers about the place where he was required to work; providing him with safe and competent superiors; repairing and remedying the dangerous, unsafe and unseaworthy condition of the machinery, tools and appliances about the place plaintiff was required to work and removing the unsafe, dangerous and negligent conditions under which the plaintiff was required to work.

D. (1) The dangers about the place plaintiff was working at the time of the occurrence of the accident, that is, the dangers incident to the use of the said step plate, its appurtenances and appliances and particularly the bracket, its appurtenances and appliances beneath the said step plate, the dangers due to the presence of an unguarded bilge or crank pit, the dangers of inadequate hand irons or grab irons about the place plaintiff was required to work and the greasy condition of all said appliances. Plaintiff was not warned of any of these dangers.

II. (1) The vessel was at sea bound for Beaumont, Texas, out of the port of New York.

(2) Plaintiff was feeling of the L. P. Journal.

(3) The first assistant engineer.

[fol. 20] (4) Plaintiff was working under general orders.

(5) Approximately between 5 and 5:30 P. M.

III. (1) The force of gravity.

(2) On the step plate attached to and connected with the L. P. column.

(3) To the best of plaintiff's recollection, belief and judgment approximately five to six feet.

(4) Each of the negligent acts hereinbefore and hereinafter alleged in this bill of particulars caused and occasioned the plaintiff to be thrown and precipitated.

IV. (1), (2), (3) and (4) In that she was not manned with safe and competent superiors, fellow-servants and co-employees; in that a step plate, its appurtenances and appliances and in particular a bracket beneath the said step plate and connected with it, was worn, dangerous, defective and out of repair; in that the said bracket was loose,

worn, out of place and otherwise defective; in that the bilge or crank pit in the vicinity of the L. P. column was open and unguarded and there was no guard rail or hand rail about the said bilge or crank pit; in that there were no adequate hand irons or grab irons about and in the vicinity of the place where plaintiff was working at the time of the occurrence and in that the step plate, its appurtenances and appliances, the grab iron or hand iron in the vicinity of the place where plaintiff was working and the said [fol. 21] L. P. column were slippery from grease and oil. Plaintiff reserves the right to further answer each and every one of the above demands after a discovery and inspection, more specifically plaintiff reserves the right to specify any defect in the construction of each and every one of the aforesaid appliances.

(6) The conditions hereinbefore alleged in this bill of particulars were such as to deprive the plaintiff of a safe place in which to work and defendant was thereby negligent.

(7) It was the duty of the defendant to inspect the machinery, equipment and appliances about the place where plaintiff was required to work hereinbefore and hereinafter alleged to be dangerous, defective and out of repair and to repair the dangerous, defective and unsafe condition of the same.

(9) The work of inspecting and repairing the place where plaintiff was working at the time of the occurrence of the accident and in particular the machinery, appliances and equipment he was obliged to use at the said place of work; defendant further failed to supervise the work of the engineers and failed and neglected to properly supervise their selection.

(10) Steps to provide the plaintiff with a safe place to work, that is, to provide him with safe, proper and seaworthy machinery, equipment and appliances about the place he was required to work.

[fol. 22] V. (1) Plaintiff sustained a contusion, sprain and traumatic injury to his back and to the bones, nerves, muscles, tendons, tissues, vessels and organs of his back, a myositis of the lumbar region of his back, a sacro-iliac sprain of his back, abrasions of his back in the sacro-iliac region, stiffness, limitation of motion and functional dis-

ability in the use of his back, physical pain and mental anguish, a traumatic arthritis of the back. The abrasions have healed, all other injuries hereinbefore alleged are believed to be permanent.

(3) Plaintiff was hospitalized at the United States Marine Hospital at Galveston, Texas, from on or about June 5th, 1935, to on or about July 13th, 1935, as an in-patient and he was hospitalized as an out-patient at the United States Public Health Service at Houston, Texas, from on or about July 15th, 1935, to on or about July 25th, 1935, and he was hospitalized as an out-patient at the United States Marine Hospital at 67 Hudson Street from on or about August 22nd, 1935, to on or about September 4th 1935.

(4) No sum of money.

(5) During most of the time plaintiff was a patient at the United States Marine Hospital at Galveston; since that time he has not been completely confined to his bed.

(6) Plaintiff was unable to return to work until on or about January 24th, 1936. Since January 24th, 1936, plain-[fol. 23] tiff has worked approximately 340 days and during the rest of the time plaintiff has been unable to work.

(7) Since the occurrence of the accident plaintiff has worked approximately 340 days.

(8) Plaintiff has lost his wages at the rate of $72.50 per month plus the value of his board and room valued at $75 per month or a total of $147.50 per month from on or about June 4th, 1935, to date, exclusive of 340 days during which time plaintiff has been employed or the sum of approximately $1750. In addition plaintiff has spent approximately $50 for medicines, medical care and attention.

VI. (1) The plaintiff received no medical care and attention aboard the ship, the master gave him a piece of gauze and instructions in connection with the use of it but administered no treatment to him and none of the other officers treated the plaintiff although two of plaintiff's ship mates at the plaintiff's request administered some treatment.

(2) The accident occurred approximately between 5 and 5:30 P. M., and the plaintiff is not certain but approxi-

mately one-half hour thereafter the master gave him a piece of gauze.

(3) Already answered.

(4) It was improper in that it was not sufficient.

(5) Plaintiff's requirements with respect to food, water [fol. 24] and personal toilet requirements were not properly and adequately taken care of.

(8) Each and every one of the injuries hereinbefore alleged were aggravated and made more serious.

Dated, New York, April 26th, 1937.

Yours, etc., George J. Engelman, Attorney for Plaintiff, O. & P. O. Address, 44 Whitehall Street, Borough of Manhattan, City of New York.

To Louis Mead Treadwell, Esq., Attorney for Defendant, 26 Broadway, New York City.

Duly sworn to by Herbert A. Smith, Jr. Jurat omitted in printing.

[fol. 25] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

L. 62-165

HERBERT A. SMITH, JR., Plaintiff,

against

SOCONY VACUUM OIL COMPANY, INC., Defendant

JUDGMENT

The above entitled action having been duly tried before the Honorable William Bondy, District Judge, and a jury in the United States District Court for the Southern District of New York on June 8th, 9th, 10th, 11th and 14th, 1937, [fol. 26] and the plaintiff having duly withdrawn the second cause of action under the plaintiff's complaint and the jury having duly rendered a verdict on June 14th, 1937, in favor of the plaintiff and against the defendant on the first cause of action of the plaintiff's complaint in the amount of Five Thousand Dollars ($5,000), and the jury having duly rendered a verdict in favor of the plaintiff and against the defendant on the third cause of action of the plaintiff's complaint in the amount of Five Hundred Thirty-five Dol-

lars ($535), and the defendant having moved to set aside the verdict of the jury with respect to the first cause of action of the plaintiff's complaint and also with respect to the third cause of action of plaintiff's complaint and the said motions having been denied, it is

Adjudged that the plaintiff recover from the defendant the sum of Five Thousand Five Hundred Thirty-five Dollars ($5,535) plus the sum of Seven 14/100 Dollars ($7.14) interest from June 14th, 1937, together with the sum of Thirty-six 25/100 Dollars ($36.25) costs as taxed, making in all the total sum of Five Thousand Five Hundred Seventy-eight 39/100 Dollars ($5,578.39) and that plaintiff have execution therefor.

Dated, June 22nd, 1937.

(Sgd.) Charles Weiser, Clerk.

[fol. 27] In United States District Court, Southern District of New York

L. 62-165

Herbert A. Smith, Jr., Plaintiff,

vs.

Socony Vacuum Oil Company, Inc., Defendant

Bill of Exceptions

Before Hon. William Bondy, D. J., and a Jury

New York, June 8, 1937; 2:15 p. m.

Appearances

George J. Engelman, Esq., Attorney and Counsel for Plaintiff.

Louis Mead Treadwell, Esq., Attorney for Defendant, Henry B. Potter, Esq., of Counsel.

(A jury was duly impaneled and sworn.)

(Mr. Engelman made an opening statement to the jury on behalf of the plaintiff.)

Colloquy

Mr. Potter: Mr. Engelman, do I understand that you are [fol. 28] going to press your second cause of action—that

is the one for failure to provide for proper care? You didn't say anything about it in your opening.

Mr. Engelman: Yes.

Mr. Potter: So that you have three causes of action?

Mr. Engelman: Yes.

Mr. Potter: Some months ago the defendant moved for a physical examination of the plaintiff. He was a non-resident and it was difficult to get the examination and it was thereupon agreed by counsel that the defendant's doctor might make the examination before we proceeded to trial. Now we have had some difficulty in arranging for that under this stipulation. May I have a direction at the conclusion of court this afternoon that a time and place be fixed at which plaintiff may be examined?

The Court: Do you know of any authority which warrants that in a Federal Court?

Mr. Potter: Yes, sir; I do.

The Court: It is common knowledge that you cannot have a physical examination before trial.

Mr. Potter: That is true, your Honor.

The Court: Now, let's see whether there is any exception when an examination may take place at the trial.

Mr. Potter: The point I am coming to is that we made a motion on the regular Motion Calendar for the physical examination and rather than argue that question counsel stipulated in writing that he would submit the plaintiff for that examination.

The Court: Have you got that stipulation?

[fol. 29] Mr. Potter: I have that stipulation here, and it is pursuant to that stipulation that I want the time and place fixed.

Mr. Engelman: Your Honor, we don't object and we never have objected to that examination. It was simply a question of the time and place, and I communicated with my adversary on Friday, but his doctor was not available.

Mr. Potter: Let him now designate a time and place.

The Court: If you have stipulated I have no doubt that you will give effect to your stipulation without an order of the Court. The only question now is if you can agree on a place and time.

Mr. Potter: I assume we are adjourning at four o'clock.

The Court: Is that agreeable? Four o'clock this afternoon?

Mr. Engelman: Yes, in my office at four o'clock this afternoon.

Mr. Potter: Under the stipulation we were to have a physical examination or the right to take x-rays if we so desired. Manifestly, no x-rays can be taken at an attorney's office. I therefore ask that the place of the examination be made at the doctor's office.

Mr. Engelman: Your Honor, my answer to that is this: We had an x-ray taken and we can say that the x-rays are negative and there is no necessity for taking any more x-rays and I have so told Mr. Potter on many occasions.

Mr. Potter: Will you stipulate on the record that any x-ray taken of the plaintiff at the present time would be negative and disclose no back injury?

[fol. 30] Mr. Engelman: I will not so stipulate.

The Court: He is willing to stipulate that the x-ray pictures if taken today would be negative, and he also is willing to stipulate, as I understand, that any x-ray pictures taken since or taken at the time he took them, the x-rays taken of him were negative.

Mr. Potter: Yes, sir. I accept that stipulation.

The Court: You accept it. But he doesn't stipulate that if so there was no injury.

Mr. Potter: I understand that.

Mr. Engelman: That is my position. I will not stipulate that they show no injury; I will simply stipulate that they are negative.

The Court: And they don't show any injury.

Mr. Engelman: As far as an x-ray goes. We claim there is an injury but the x-ray doesn't show it.

The Court: I understand the position to be that they want to take an x-ray and you say that it is unnecessary. Of course, you will concede that an x-ray taken today will not show any injury. There may be an injury, but an x-ray if taken will not show it. You will also stipulate that any x-ray taken heretofore will also show negative and will not show an injury, but you will not stipulate that there is no injury? Both of you agree to that?

Mr. Engelman: I agree to that.

Mr. Potter: May we have the physical examination by our doctor between four and six o'clock this afternoon at Mr. Engelman's office?

The Court: Is that agreeable?

Mr. Engelman: I would like to get home some time to-
[fol. 31] night? Can we make it before four and five?

Mr. Potter: I don't know whether I can get a doctor to make it at that precise time. I say some time between four and six is a reasonable time.

The Court: Mr. Engelman, do you live out of town?

Mr. Engelman: I don't, your Honor. Can he make it between four and five-thirty?

The Court: Why not make it between four-thirty and five-thirty? Compromise.

Mr. Potter: All right, if I can get the doctor.

The Court: Why not let Mr. Engelman know as soon as you can, and if not, why not have the examination tomorrow between nine and ten o'clock?

Mr. Potter: That is perfectly agreeable. That is agreeable to the defendant.

The Court: Now, did you want to open briefly? You might make your openings and adjourn.

Mr. Engelman: I thought we might get started this afternoon.

The Court: His original request was to adjourn for a physical examination. Do you want to adjourn until you have taken the examination?

Mr. Potter: No, sir. I will open now very briefly.

The Court: I think that is the right thing to do.

Mr. Potter: And make as much progress as possible.

(Mr. Potter made an opening statement to the Jury on behalf of the defendant.)

Mr. Potter: Dr. Spaulding will be at your office at 4:45 this afternoon.

[fol. 32] Herbert Augustus Smith, Jr., the plaintiff herein, called as a witness in his own behalf, being duly sworn, testified as follows:

Direct examination.

By Mr. Engelman:

Q. Mr. Smith, you are the plaintiff or the party who is suing here; is that correct?

A. Yes, sir.

Q. How old a man are you?
A. I am 34.

The Court: How old?
The Witness: 34, sir.

Q. And what is your business or occupation?
A. As a tradesman I am a carpenter.
Q. When did you begin that type of work?
A. Approximately 1923.
Q. And do you recall the date that you started to go to sea?
A. February 2, 1934.
Q. You claim to have met with an accident on June 2nd of 1935; is that correct?
A. Yes, sir.
Q. From the time you started to go to sea were you pretty much continuously employed at sea up to the date of the accident?
A. I was.

The Court: When did you first go to sea?
The Witness: February 2, 1934.

Q. What was your job when you first went to sea on February 2, 1934?
A. I was a wiper on the Steamship Tiger.
Q. And was that vessel owned and operated by the defendant in this action, the Socony Vacuum Oil Company, Inc.?
A. Yes, sir.
[fol. 33] Q. Was all your services up to the date of the accident on vessels owned and operated by this defendant?
A. Yes, sir.
Q. Your first job was that of wiper, was it?
A. That is right.
Q. What other jobs did you have at sea other than that of wiper?
A. On August 22, 1934, I was made fireman.

The Court: You were what?
The Witness: I was made fireman aboard the same ship, the Tiger, and I — discharged on November 20, 1934.

Q. When did you become an oiler?
A. I became an oiler I should say on December 30, 1934, aboard the Steamship China Arrow.

Q. And after leaving the China Arrow what ship did you join?

A. Because of no work for the China Arrow we were tied up in Baltimore, the crew was paid off in Baltimore and I went home to Providence.

Q. How long were you at home in Providence?

A. I should say a week or ten days at the most.

Q. Did you ship out then?

A. I did. I shipped out on the Yankee Arrow.

Q. Do you recall when you joined the Yankee Arrow?

A. April 24th, 1935.

Q. At what port?

A. The Port of Providence.

The Court: Where?

The Witness: Providence, Rhode Island.

Q. As an oiler?

A. As an oiler, yes, sir.

Q. And what were your wages?

A. $72.50 per month and keep.

[fol. 34] Q. By keep you mean your room and board on the ship?

A. Room and board; yes, sir.

Q. When you joined that vessel at the Port of Providence on April 24th—is that the correct date?

A. That is the date; yes, sir.

Q. Did you receive a physical examination?

A. I did by a company doctor by the name of Haskell in Riverside, Long Island.

. . . . . .

[fol. 35] Q. What was the last port that this ship, the Yankee Arrow, was at prior to the occurrence of this accident?

A. Baltimore, Maryland.

By the Court:

Q. You shipped in Providence on April 24, 1935?

A. Yes, sir; and we went to the Port of New York, the Erie Basin, Robins Drydock for repairs, from there to Baltimore, Maryland, and we left Baltimore, Maryland, for the Port of Beaumont, Texas, and it was on that voyage that I was hurt.

Q. When did your voyage begin on which you were injured?

A. May 28th, I believe, to the best of my recollection.

Q. What port did you leave on May 28th?

A. Baltimore.

Q. Where was the ship bound for?

A. For Beaumont, Texas.

By Mr. Engelman:

Q. At the time this accident occurred was the vessel at sea?

A. Yes, sir.

Q. Do you know her approximate location with respect to any mainland?

A. We were off the coast of Florida.

By the Court:

Q. Where?

A. Off the coast of Florida near the Gulf.

[fol. 36] Q. Were you in the Gulf?

A. In the Gulf of Mexico; yes, sir.

By Mr. Engelman:

Q. What time of day did this accident happen?

A. On the four to eight p. m. watch, approximately five to five-thirty.

Q. Will you tell the Court and Jury what the four to eight p. m. watch means on board ship?

A. Well, in this particular type of work oilers have watches. There is a four to eight p. m. watch, an eight to twelve watch, and a twelve to four watch. There is one oiler, one engineer and one fireman on watch at a time, and it was on this watch that I was hurt.

Q. Without getting down to the accident, will you tell us what kind of work you were doing at the time the accident occurred?

A. My work consisted of oiling what is known as an up and down job.

The Court: Oiling what?

The Witness: Oiling what is known as an up and down job, what is known as a steamship—that is steam; not diesel.

Q. When you refer to an up and down job you meant the engine?

A. Yes.

Q. More particularly, what part of the engine?

A. At the time of the accident I was feeling of the after side of the L. P. Journal.

By the Court:

Q. You were feeling?

A. Feeling, yes, sir.

Q. You were what?

A. Feeling of L. P. Journal.

[fol. 37] Q. What is the L. P. Journal?

A. The journal, your Honor.

Q. What is the L. P. Journal?

A. Well, it is a journal in which the shaft rests on and rides in. It is made of brass and some alloys, and this has to be oiled at all times in order not to get too hot. It is the support for the main drive shaft or propeller shaft.

By Mr. Engleman:

Q. And you were feeling of this business for what purpose? To determine what?

A. To determine how my engines were running.

Q. Did you do that job pursuant to any specific command or was that a job that you naturally did in the course of your work?

A. That was a job that we had to do every twenty minutes on this type of ship.

By the Court:

Q. How often?

A. Every twenty minutes.

Q. You say you would feel the journal?

A. Yes.

Q. For what purpose?

A. To find out how the engines are running.

Q. To feel whether it is hot or not?

A. Yes.

Q. To feel whether it was hot or not you put your hand on the journal?

A. You put your hand on the shaft and your fingers become either white or black, and of course you can tell by the feel as well as by how they look. If they are black you can tell it is gripping or getting hot.

By Mr. Engleman:

Q. Tell us, Mr. Smith, just what you were doing and just how this accident occurred.

[fol. 38] A. At the time of this accident I was standing on the step plate attached to the L. P. column feeling of the L. P. Journal.

The Court: What?

The Witness: The L. P. column. That is the main engine support or column, if you want to call it that. And while standing on this step plate I had my right foot down on that step plate and I had my left foot down on the bearing support, and while standing on that I had to reach in. I had my hand on the slush pan.

Q. Which hand was that?

A. My left hand, and with my right hand I had to reach down eight or ten inches into this bearing support. There was a little slide that you reach into. After feeling of my bearing I stepped back, and as I stepped down my foot hit this support or bracket and I fell under the step plate causing me to fall into the bilge. Then I went down and landed on the angle iron that holds the pipes in place under the bilges.

Q. I show you two photographs, Mr. Smith, and I ask you whether those photographs are a fair representation of the scene of this accident?

A. Yes, sir; they are.

Mr. Engelman: I offer them in evidence. They are photographs that were taken by the defendant.

Mr. Potter: No objection. They were supplied by the defendant.

Mr. Engelman: That is conceded. We had an application [fol. 39] to go aboard their ship but the ship was not available so they gave me copies of their photographs. We have never been aboard the ship—at least I haven't.

(Photographs marked Plaintiff's Exhibits 1 and 2.)

Q. I show you Plaintiff's Exhibit No. 1. Have you a fountain pen there, Mr. Smith?

A. Yes, sir.

Q. On your direct examination you testified to a step plate. Would you mark the figure 1 on that photograph where this step plate is located?

A. That is the step plate (marking).

Q. While you were feeling of this L. P. journal what foot if any did you have on that step plate?

A. My right foot.

Q. When you were feeling of the journal where was your left foot? Would you indicate that on the photograph, if you can, with the figure 2?

A. Yes, sir (marking).

Q. Now, is the spot that you were feeling of with your right hand, is that illustrated in that photograph there?

A. It is; yes, sir.

Q. Will you put the figure 3 there?

A. (Witness marks on photograph.)

Q. You were feeling of this journal with what hand? Your right or your left hand?

A. My right hand.

Q. What were you doing with your left hand?

A. I was holding on to the slush pan—the eccentric slush pan.

Q. Will you put the figure 4 on that eccentric slush pan where you had your left hand?

A. (Witness marks on photograph.)

[fol. 40] Q. You spoke in your direct examination about a bracket. Is that support bracket illustrated in that photograph?

A. No, it is not.

Q. Will you draw that in there by means of a line at the particular point where it existed at the time of this occurrence?

A. This picture is taken at such an angle it is kind of hard.

Mr. Potter: I move to strike that out.

The Court: That motion must be granted.

Q. Make your answer complete.

A. I have. I have drawn the line to the best of my ability.

Q. Did you draw the bracket in there?

A. Yes, sir.

The Court: Is that the way the bracket looked?

The Witness: Well, not exactly. It came down in there, but it was attached to this little angle iron right here and then attached to the step plate out here (indicating), and that is apparently how it was.

Q. Will you put an A on this angle iron that you say it was attached to?

A. (Witness marks on photograph.)

Q. And this angle iron, was that the bottom part of the bracket?

A. Yes, sir.

Q. Describe to us how the top of this bracket was connected with the step plate.

A. It had a little set screw on the top, and it would be on the underneath side of the step plate.

Q. This bracket, about what was the width of it?

A. I should say an inch and a quarter to an inch and a half wide.

Q. Tell us again, after you were feeling of this L. P. [fol. 41] Journal with your right hand, just tell us what you did and how this accident happened so that we can hear the story again in the light of these appliances.

A. As I have stated, I had my right foot on the step plate and my left foot on the bearing support. With my left hand I was hanging onto the slush pan. After feeling of my journal my right hand had been inside a matter of eight or ten inches, and after feeling of my journal I pulled my hand out again and went to step on the main floor plates, which are located here (indicating)——

Q. Would you put an S there?

A. (Witness marks on photograph.) As I stepped back with my left foot I struck this bracket, throwing me off balance and causing me to hit my hand against the web of this crank, but in this particular instance the web of the crank was up here in this position and not down there (indicating). If it had been I would have gone inside and been killed instantly.

Q. I show you Plaintiff's Exhibit 2. In that photograph can you point out the web of this crank?

A. There is the web of the crank in the up position (indicating). That crank travels in this fashion (indicating), and it was in that position when the accident occurred. And it caused, as I have stated, it hit my hand, causing me to lose my balance and forcing me down against the slush pan, striking my back on this floor plate angle iron.

Q. Will you put an L there at this particular angle iron where you say you struck your back?

A. (Witness marks.)

[fol. 42] Mr. Potter: An L?

Mr. Engelman: An L, yes.

Mr. Potter: Is this correct? You have marked points 1, 2 and 3 and the letters A and S on the photograph?

Mr. Engelman: I believe so. I haven't kept a record.

Mr. Potter: And now you are asking him to make an L?

Mr. Engelman: That is the last thing I have asked him to make.

Q. What part of your body struck the web of this crank?

A. As near as I can recall it was my hand.

Q. Your hand?

A. My right hand and possibly my side. I know something hit going down. It may have been the support itself I hit going down. It happened so quick that it would be impossible to state just what did hit me.

Q. You say that in bringing your left foot back your left foot caught this bracket?

A. Yes, sir; it struck the bracket.

Q. How do you know? What did you feel, if anything, at the time? How do you know that your left foot hit that bracket? Why do you say that?

Mr. Potter: I object to the form of the question as to why he says that. I think it is improper in form and leading and suggestive. I think the witness should say what took place.

The Court: Don't lead him.

[fol. 43] By the Court:

Q. After your hand struck—the crank, was it?

A. The web of the crank.

Q. What happened?

A. I was forced down in between the slush pan and the bearing support.

Q. The slush pan?

A. Yes; that is the slush pan (indicating).

Q. And what else?

A. And the bearing support. That is this part of the machine—part of the engine. Striking my back on the angle iron that supported the floor—the main floor plate.

Q. That you marked L?

A. That I have marked L; yes, sir. Going down from there through down to the bilge and landing on another angle iron, and there I stopped.

Q. Where is the bilge on the picture?

A. No, they are down below underneath the floor plates.

By Mr. Engleman:

Q. So that we may have it straight, which happened first? Did you hit the web of the crank first or did you hit your foot against this bracket first?

A. I hit the bracket first going down, naturally.

The Court: Which did you hit first?

The Witness: I hit the bracket. I struck that with my foot, causing me to lose my balance. If anyone who has ever been to sea——

Mr. Potter: I move to strike that out.

Mr. Engelman: I consent to it being stricken out.

[fol. 44] Q. When you lost your balance, then what happened?

A. The web of the crank hit me.

Q. What happened next?

A. Throwing me into the slush pan down into the bilge.

Q. Now if you direct your attention to this step plate that you were standing on, will you tell us what the condition of that step plate was at the time of the occurrence of this accident?

A. It was loose.

Q. And to your knowledge how long had it been loose?

A. For quite some time.

Q. When you say "For quite some time," what do you mean? A week or two weeks or how long?

A. Well, to the best of my recollection, as long as I have been on that ship.

Mr. Potter: Well, I move to strike it out if it is to the best of his recollection.

The Court: I will strike that out.

When was the first time that you noticed that that step plate was loose?

The Witness: Two or three weeks previous to the accident.

Q. Directing your attention to this bracket which you have stated went underneath this step plate, had you ever prior to this occurrence seen that bracket out of place?

A. Yes, sir.

Q. When?

A. Possibly two or three weeks previously.

By the Court:

Q. When?

A. Possibly two or three weeks previous to the accident.

[fol. 45] The Court: You say the bracket was out of place.

Mr. Engelman: Yes, out of place.

The Court: Did anybody say it was out of place?

Mr. Engelman: I understood him to have already testified to that.

The Court: He used the words "out of place"?

Mr. Engelman: That was my recollection. Maybe I am in error.

Q. Did you say that?

A. Yes, sir.

By Mr. Engelman:

Q. When you used the term "out of place" what do you mean by that?

A. I mean just this: The bracket supporting the step plate to be in place would naturally be in this place somewhere (indicating). Thereabouts (indicating).

Q. Was it made fast to the underside of the step plate?

A. It was, but it worked in this fashion (indicating).

Q. So that the top of it was projecting out?

A. Out of the step plate.

Q. You say that condition you saw how long prior to the occurrence of the accident?

A. I should say two or three weeks.

Q. Did you report it to anyone?

A. I did.

Q. To whom did you report it?

A. To the first assistant engineer.

Q. Do you see him in court here now?

A. Yes, sir.

Q. Is he one of the gentlemen sitting here?

A. He is.

[fol. 46] By the Court:

Q. When did you first report it?

A. I reported it in the Erie Basin. I was the storekeeper at the time.

Q. Before you went on the last trip?

A. Yes, sir.

Q. What was the ship doing at the Erie Basin?
A. It was in there for repairs to the engines.

By Mr. Engelman:

Q. On Plaintiff's Exhibit No. 1 is there any grab-iron illustrated on that photograph?
A. There is; yes, sir.
Q. Suppose you put a G there.

Mr. Potter: Which photograph is it on? Plaintiff's Exhibit 2?
Mr. Engelman: Plaintiff's Exhibit No. 1 I said.

A. That is the grab-iron (marking).
Q. Were you holding onto that at the time of the occurrence of this accident?
A. Absolutely not.
Q. Why weren't you holding onto it at the time of the occurrence of the accident?
A. Because in order to do your work as an oiler it would be impossible to hold that grab-iron and yet reach into the engine.
Q. You mean the distance from the grab-iron to the L. P. Journal was too far?
A. Yes, sir.
Q. Was there any other appliance in the nature of a grab-
[fol. 47] handle or grab-iron or anything else that you could hold onto while you were doing this work?
A. Nothing at all.
Q. This bilge or crank pit that you stated you fell into, about what was the depth of that?
A. The very bottom of the bilge is possibly six to eight feet deep, but remember, I hit some angle irons, and that is where I stopped—possibly four feet deep.

The Court: You stopped on the floor?
The Witness: On the angle iron that ran below the bilges. They are below.

Q. Can you give us, if you will, the dimensions of this particular space, that is, the depth and width of this particular space into which you fell?
A. I say the depth is approximately four to six feet, and the width is about 18 to 20 inches wide.
Q. Were there any guard rails around that place at the time of this occurrence?

A. There were none. The picture shows that.

Q. In other words, that open space was there?

Mr. Potter: I object to the form of the question. It is leading and suggestive.

Mr. Engelman: I withdraw it.

Q. After you fell down into this opening, into the bilge, what was the next thing that occurred?

A. The first assistant helped me out and sat me on a paint can under the ventilator.

Q. What happened next?

A. The next I knew the fireman who was on the same watch with me was putting water on me. Whether I fainted [fol. 48] from the heat or from the blood and so forth I don't know.

Mr. Potter: I move to strike out the answer if the witness doesn't know.

By the Court:

Q. You had water on you?

A. I know I was plenty wet. If I had fainted away, I don't know. I don't know what took place between the time I fainted away and the time I came to.

Q. When you came to you were wet?

A. Yes, I was wet.

Q. What happened?

A. The same fireman helped me to the top side.

Q. What do you mean by the top side?

A. That is on the top of the steps. That is the main deck of the ship.

Q. He took you up?

A. Yes, sir.

Q. What did he do?

A. He left with me with two seamen.

Q. Did he carry you?

A. He helped me. He didn't carry me, but he helped me.

Q. Up to the main deck?

A. Yes, sir; and left me with two seamen and they helped me to the pilot house or the captain's quarters. He had to go below again because he was on the watch.

Q. Two seamen helped you to the captain's quarters?

A. Yes, sir.

Q. What happened next?

A. The captain gave me a small—well, the first thing he told me not to go on the carpet because of the fact that I would get it full of blood. He then handed me a piece of [fol. 49] gauge which I have in my pocket, three inches square. I was bleeding from my shoulder to my shoes. He put a very small amount of Unguentine on a little cotton swab on my fingers and told me to go down below to my quarters and wash off. Naturally, I was grist from head to foot. He told me to go down to my quarters and wash off and put this gauze that he gave me on. If any of the gentlemen care to see I will show it.

Mr. Potter: I move to strike that out.

The Court: Yes.

Q. Tell us what happened on the ship on June 2nd, not what has happened today. The Court will say what is happening today.

A. The same two seamen helped me to my quarters. They bathed me to the best of their ability and got me in bed into my bunk.

Q. What time?

A. Between five and five-thirty on the p. m. watch.

Q. What happened after that?

A. I went to my bunk and naturally I stayed in my bunk until we docked in Beaumont, Texas.

Q. When did you dock?

A. June 4th, I should say, around some time between ten and eleven o'clock.

Q. In the morning?

A. In the morning; yes, sir.

Q. What happened then?

A. I paid off the ship there before the third mate. I didn't see an officer of any kind until the very next morning after the accident.

Q. What did you do when you landed?

[fol. 50] A. I immediately went upon the advice of the third mate to a doctor in Beaumont, a company doctor.

Q. Did you stay in your bunk until you got to Beaumont?

A. Yes, sir.

Q. And then you got up out of your bunk in Beaumont?

A. Yes, sir.

Q. What did you do then?

A. I had one of the seamen help me back. In fact, he helped me take my bags and helped me there. He called a taxi and the taxi came and got me and took me to a company doctor.

Q. Did the seaman go with you?

A. Yes.

Q. What is his name?

A. George Boutier.

Q. Is he in court?

A. I don't see him; no, sir.

Q. Do you know the doctor's name?

A. Either Dr. English or Dr. Brownrick. There were two company doctors, and which one examined me I don't know.

Mr. Potter: I move to strike that out—the two company doctors.

The Court: Strike that out.

Q. You saw either Dr. English or Dr. Brownrick?

A. Yes.

Mr. Potter: I move to strike out the previous portion of the witness's answer that he went to some doctor on the advice of the third mate.

The Court: "On the advice of the third mate" will go out.

Q. You went to a doctor, no matter who told you to go?

A. Yes.

. . . . . .

[fol. 51] Q. When you got back to your quarters right on the day of the accident were you injured any place?

A. Absolutely.

Q. Where?

A. My back—the lower part of my back and my spine.

Q. Where was this blood coming from?

A. I imagine from falling on this angle iron—from falling on my back.

Q. I didn't ask you how you got it; I asked you where it was.

A. The right side of my hip and the lower part of my spine.

Mr. Engelman: Indicating the lower part of the back.

The Witness: Right across there (indicating).

Q. Did you have any cuts any other place?

A. On my fingers.

Q. What hand?

A. Two fingers of my left hand.

[fol. 52] Q. Did the master come down to your quarters to see you during the voyage?

A. Not once.

Mr. Potter: I object to the form of the question. It is suggestive.

The Court: Don't lead. I tried to show you. You were not at the accident. None of us were except this man. You know only what he has told you. He is under oath. Even if you were allowed to lead you shouldn't lead. The jury wants to hear him. They want to hear his story.

Did anybody come to see you at your bunk?

Q. Did anybody come down to see you?

A. No, sir; only my shipmates, the very first morning after the accident. The next morning after the accident the first assistant and the chief engineer came down and they just scolded me in regards to what I told the captain how the accident occurred and went back.

The Court: Who came down to see you the first morning?

The Witness: The first assistant engineer and the chief engineer. That was the morning after the accident.

Q. Now, after you got this piece of gauze and Unguentine did anybody aboard ship give you any further treatment?

A. Only my shipmates, and that wasn't a great deal, because there is just first aid that all seamen carry, and a little bottle of iodine and a little piece of gauze.

[fol. 53] By the Court:

Q. Who gave you iodine?

A. The seamen, my shipmates.

Q. They gave you iodine?

A. Yes, sir, the first aid. The general run of first aid that a seaman has.

Q. Has he got a kit?

A. No, a small bottle of iodine and a little piece of gauze and a little salve and a few pills—things of that sort.

By Mr. Engelman:

Q. How did you get your meals? Did you go to the mess hall?

A. I didn't. The day after the accident I didn't get any meal. When I didn't get any dinner until two o'clock the fireman brought it to me. Only for him I would have gone to Beaumont without any food.

By the Court:

Q. You say the day after the accident you didn't eat anything?

A. Until two o'clock in the afternoon.

Q. But you got something to eat?

A. Yes, sir.

Q. Who gave it to you?

A. My fireman.

Q. When did you get it the next time?

A. At night. After that I had plenty to eat. Everybody brought me food—that is I mean my shipmates; none of the officers. When they had learned that I had gone without anything to eat——

Mr. Potter: I move to strike that out.

[fol. 54] Mr. Engelman: I will consent to strike that out.

By Mr. Engelman:

Q. Did you pay off the ship at Beaumont, Texas?

A. I did; yes, sir.

Q. And did you receive your wages?

A. I did up until June 4, 1935.

Q. And when you left the ship where did you go?

A. The first place I went was to the doctor.

Q. And where was the doctor's office located?

A. About, I should say, a half or three-quarters of a mile from the dock.

Q. Was the doctor employed by this defendant, the Socony Vacuum Oil Company, Incorporated?

Mr. Potter: I object to the question.

The Court: You are asking for a conclusion whether he was employed by the company.

By the Court:

Q. Did anybody tell you which doctor to go to?

A. Yes.

Q. Did you speak to somebody about the doctor you would go to?

A. To Mr. Cousins.

Q. Who is Mr. Cousins?

A. He is either port captain or superintendent of docks in Beaumont, Texas, and the third mate advised me to go to Dr. English. Naturally, I was bloody from head to foot——

Q. Who was Mr. Cousins?

A. He is either port captain or superintendent of docks.

Mr. Potter: I move to strike that out on the ground that [fol. 55] Mr. Cousins is in no way connected with this defendant, and it can't be established that he is. And certainly this witness has no knowledge as to who he is or what his authority is.

Q. Mr. Cousins and the third mate told you to go to see Dr. English?

A. Yes.

The Court: I will strike out the characterization as to what Mr. Cousins is.

By Mr. Engelman:

Q. What did this doctor do for you?

A. He examined me and strapped me up with adhesive tape, and upon his authority I was admitted to the Marine Hospital in Beaumont.

Mr. Potter: I move to strike out "on his advice."

The Court: That is a conclusion.

By the Court:

Q. Dr. English examined you?

A. Yes.

Q. Did he strap you?

A. Yes.

Q. Entirely?

A. Entirely.

Q. What did he do?

A. He laid me out on his table and he used mallets and rubber hammers and gloves and that sort of thing and gave me a thorough examination.

Q. Then what did he do or what did you do?

A. After the examination I was advised to go to the hospital.

Q. You say you were advised. Did he tell you?

A. Yes, sir.

[fol. 56] Q. What did he tell you?

A. He told me—he said, "I would advise you to go to a hospital. You can go back to New York on our ship and go to a hospital there or you can stay here in Galveston." I said, "After the care that I have had on the ship I will stay here in Galveston," which I did.

Q. Did you then go to the Marine Hospital?

A. Yes, I went to the Marine Hospital on the morning of June 5, 1935.

Q. At Galveston?

A. Yes, sir.

Q. What did you do there?

A. I was there from June 5th until July 13th, 1935. While I was there I took heat treatments and oil treatments.

Q. To what date?

A. July 13th.

Q. You took heat treatments?

A. Yes, sir.

Q. Did they keep you in bed?

A. Yes, sir. The first week I was in bed and then he told me that the exercise in getting around would help me. They gave me heat treatments and oil treatments and therapy treatments.

Q. What do you call therapy treatments?

A. That is a form of heat also. There is a violet ray lamp and then there is another type of lamp that they use, and they used them all on me.

Q. Then what happened after that?

A. July 13th I was discharged from that hospital. I went to Houston, Texas, where I was treated as an out-patient from July 15th.

Q. At what hospital?

A. It was a public health service. I was treated by a Dr. Moore, and in that case I was treated as an out-patient from July 15th to July 28th.

[fol. 57] Q. What did you do there? What did they do to you?

A. He gave me oil treatments and massages and he also strapped my back up on three occasions.

Q. What do you mean by "strapped your back"?

A. He put adhesive tape around it as tight as he possibly could. He just pulled it as tight as he could on three occa-

sions that I went there. Previous to that he gave me oil treatments.

Q. Did they give you adhesive tape in Galveston?

A. No, sir.

Q. At Galveston did they tie up your back? Strap it?

A. They did. Possibly the first week I was tied up, and they just kept to the heat treatments and oil.

Q. What did they strap you with?

A. With adhesive tape.

Q. You kept that on a week?

A. About, approximately.

Q. At Galveston?

A. Yes.

Juror No. 1: May I ask a question?

The Court: Yes.

By Juror No. 1:

Q. What are the oil treatments that you are talking about? Are they external treatments?

A. No, they rub it on the outside and then the heat penetrates this oil, I imagine.

Q. It is a massage of oil?

A. Yes, sir.

The Court: Go ahead. He is your witness.

[fol. 58] By Mr. Engelman:

Q. After this accident occurred, did you have any pain in any part of your body?

A. I did; yes, sir.

Q. Where?

A. In the lower region of my spine and the right side of my hip. I still have it.

By the Court:

Q. Are those the only places where you felt pain?

A. Yes.

Q. The only places?

A. Yes, sir; right here (indicating).

Mr. Engelman: Indicating the lower part of the back.

The Court: He said the spine and hip. Indicating the small of his back.

By Mr. Engelman:

Q. When you got up out of your bunk on the Yankee Arrow did you notice anything when you got up and started to walk? Did you notice anything?

A. I noticed that I was hurt.

By the Court:

Q. What is that?

A. I was hurt and noticed many things.

Q. Tell us what you noticed. We weren't there.

A. Well, I had a sharp pain, and the more I walked the more it pained.

Q. Anything else? Tell the jury. They weren't there.

A. I couldn't lift and I couldn't bend over. I know on one [fol. 59] instance I opened my locker and a pin or spring flew out and I went to pick it up and I couldn't bend over.

Juror No. 1: You couldn't bend down?

The Witness: No, sir; and I had a seaman come in to help me pack and they were all so good I didn't want them to pick——

Mr. Engelman: Just answer the question.

The Witness: I didn't want them to put themselves out. And I couldn't pick up the bag and so I had to have the help of a seaman, and they were all fine and helped me.

By Mr. Engelman:

Q. What did you do after you took your last treatment at the Public Health Service over at Houston?

A. I immediately went to Beaumont, Texas, to the company office.

The Court: After you were at Houston you came back to Beaumont?

The Witness: To Beaumont, Texas, back to the company office, the Magnolia Oil Docks.

* * * * * * *

[fol. 60] By the Court:

Q. When you left Houston did the doctor say anything to you?

A. Upon leaving Houston the doctor advised me to take sun baths and heat treatments if possible. I told him that I wasn't a millionaire——

Q. You were not asked what you told him. He can try and ask you what the doctor told you if he wants to and he will see what happens.

A. I left Houston and went to Beaumont and I arrived in Beaumont and went to the office and I was examined again by the doctor there. He strapped me up. He took the adhesive tape off that had been put on by Dr. Moore.

Q. Did you get oil and heat treatments?

A. Not in Beaumont, but I did get new adhesive tape.

Q. You got oil treatment, you say?

A. Just the adhesive tape, not the treatments. After I got the adhesive tape put on I went out and talked with Captain Cousins or Mr. Cousins in regard to getting back north to my home and my people.

[fol. 61] Q. How long did you stay in Beaumont?

A. I stayed there from July 28th till about the 7th of August.

Q. And then did you come home? Where did you go to?

A. I went to the office and they put me on the Motorship Aurora, one of the Standard Oil Company ships, and sent me back to New York as a passenger. And on the trip north I was strapped twice by Captain Colson. Naturally, the adhesive tape from the heat would roll and crinkle up, and he had new adhesive tape put on twice in nine days.

Q. When did you arrive in New York?

A. Either the 11th or 12th of August.

Q. What did you do when you got to New York?

A. I went to the Hudson and Jay Street Hospital here in New York. Upon my entrance there as an out-patient I was given heat treatments, massages, and was measured for a sacroiliac belt, which I now wear and have worn since that time.

Q. And what?

A. A sacroiliac belt or some term that they have, and upon the measurements and so forth—I was measured for the belt—and I have it on at present and I have had it on ever since I received it. Upon leaving the hospital——

Mr. Engelman: Just a minute, Mr. Smith.

Q. How long were you an out-patient?

A. From August 22nd until September 4th, I believe. Yes, it was.

Q. August 22nd?

A. August 22nd to September 4th.

[fol. 62] Q. What did you do after September 4th?

A. I went from here home.

Q. Where is your home?

A. Rhode Island, Providence.

Q. Providence?

A. It is in East Greenwich, just out of Providence.

Q. What did you do at home?

A. There wasn't much that I could do.

Q. I don't know what you mean by "There wasn't much that I could do."

A. When I first got home I tried to do a little work around the house, and I couldn't.

Q. What did you try to do? The jury weren't there.

A. I tried to work, but I couldn't.

Q. Do you want some water?

A. Yes, please.

The Court: Give the witness some water.

The Witness: I didn't mean to get excited, but I couldn't help it.

Q. Well, you weren't exicted. Take it easy. Now, you got home?

A. I left here for my home in Providence, Rhode Island, and I tried to do a little work. In fact, I didn't go to work until January 24, 1936. At that time I went back to work for my brother as a carpenter, but I couldn't keep it up because of the lifting.

Q. Tell the jury what you did between the time you got home and January, 1936.

A. Well, I took sun baths. I tried everything.

Q. Tell the jury. You took sun baths?

A. Yes, sir; and it didn't help me.

Q. Go ahead.

A. And then after the sun baths I talked with friends—I talked with everybody, because I want to get better.

[fol. 63] Q. About what?

A. About my back. I wanted to get well. They told me to go to a chiropractor and I did. It didn't help. Nothing has helped.

Q. What else did you do?

A. Then I found that that wouldn't help so I went back to a doctor and I had an examination. He told me that there was nothing I could do about it.

Q. You said you went back to a doctor. We only want the facts. You went back to a doctor?

A. Yes, sir.

Q. Did you go to see a doctor?

A. Yes, sir.

Q. What was his name?

A. Dr. George Young.

Juror No. 1: In Rhode Island?

The Witness: That is in East Greenwich. I have his receipts there. Previous to that I went to a chiropractor in Arctic, Rhode Island, and he had helped me a little, not a great deal. Whenever I tried to do any lifting or work of any kind it just bothered me. I got discouraged and I went back to Dr. Young.

Q. What did Dr. Young do?

A. He said that there is nothing he could do—there is nothing that anybody can do.

Q. What?

A. He said there is nothing that you can do.

Q. Did he say anything about the belt you were wearing?

A. He said to wear it.

Q. What?

A. He said that I would have to wear it and give up my job.

Q. Were you working then when he said give up your job? Were you working at the time?

A. It was in February of this year.

[Vol. 64] Q. In February, 1937?

A. Yes, sir.

Q. Were you doing work then?

A. Yes, sir.

Q. What were you doing then?

A. I was working as a carpenter and millwright in the Pontiac Finishing Company.

Q. Did you stop working as a carpenter?

A. Yes, sir. I am back working with my brother.

The Court: Go ahead now. If he has told you anything he has forgotten to tell the jury, bring it out. I haven't seen the witness before. I don't know his story. If there is anything forgotten, bring it out.

By Mr. Engelman:

Q. Down at the Marine Hospital in Galveston, were you circumcised down there?

A. The very last week of my stay down there I commenced to feel a little better. They didn't do me any good——

Mr. Potter: I move to strike that out.

The Court: That is not responsive. Strike it out.

Mr. Engelman: I consent to its being stricken out.

Q. Were you circumcised down there?

A. Yes, sir.

By the Court:

Q. Were you?

A. Yes, sir.

[fol. 65] Q. That is, at Galveston? A. Galveston Marine Hospital, yes, sir.

By Mr. Engelman:

Q. And that circumcision healed up before you left the hospital, did it?

A. Approximately, yes, sir.

Q. Now, this belt that you spoke about that they got for you at the Hudson and Jay Street Hospital, will you just tell the Court and jury what this belt is like? Would you describe it?

A. Well, it is made of duck, of heavy duck webbing. It is about from here to here (indicating), and there were three straps. There were two that go from this side to here—one at the top and one at the bottom—and there was one that goes completely around it, and there were two that go completely under my legs. It is always tight. It is made to fit tight to my back and to my spine and to my hip.

Q. Now, do you find that this belt relieves your condition? Does it help you in any way?

A. It does in normal conditions, but if I go to work or anything it doesn't help me any.

Q. But in normal walking it helps you?

A. Yes, sir.

By the Court:

Q. Do you wear the belt at night?

A. I take it off when I go to bed, but that is the only time.

Q. Have you any pain now?
A. Yes, sir.
Q. Where do you have pain now?
A. Right here (indicating).
[fol. 66] Q. Do you have pain right now?
A. Yes, sir.
Q. And you have pain when the belt is on?
A. Yes, sir. But there are times when it is more severe than at other times.
Q. Are you always in pain? A. I wouldn't say—I am to a certain extent. I mean a dull pain, but today it is more so than it was two or three days ago perhaps because of the——
Q. Never mind perhaps. You have pain when you walk when you have the belt on?
A. Yes, sir.

By Mr. Engelman:

Q. Where were you examined and treated down in Beaumont, Texas, the second time you went there before you came back to New York on the Aurora?
A. I was treated and examined by the company doctor, by the same doctor.

The Court: That is stricken out. You can't know whether it was a company doctor of your own knowledge.

By the Court:

Q. When you were down in Beaumont what doctors did you see?
A. Dr. Brownrick and Dr. English.
Q. Both, or one or the other?
A. Either Dr. Brownrick or Dr. English.
Q. After you left Beaumont and then came back again what doctor did you see?
A. Either one or the other.

Juror No. 12: The same doctor that treated you the first time?
The Witness: I believe so. I know that there are two [fol. 67] doctors, Dr. Brownrick or Dr. English. Whether it was Dr. English or Dr. Brownrick that treated me each time I don't know.
Juror No. 12: Was it the same doctor that treated you?
The Witness: Each time. I think so, yes, sir.

By Mr. Engelman:

Q. Where was the doctor's office that treated you at Beaumont?

A. At the Magnolia Oil & Refining Company in Sabine, Texas, that is in Beaumont, in the outskirts of Beaumont.

Q. You testified that you saw a chiropractor. About how many times did you see him?

A. I should say ten or more times.

Q. What did you pay him for each visit?

A. $3.

. . . . . .

[fol. 68] By the Court:

Q. How often did you go to the chiropractor?

A. Once a week.

Q. For how long?

A. I should say for nine or ten weeks.

Q. How many times were you there in all?

A. Ten times anyway.

Q. How much did you pay him? Do you remember?

A. $3 a visit.

Q. You swear you paid him $30?

A. Well, I wouldn't say—yes.

Q. $27 or $30?

A. $27 or $30, yes, sir.

[fol. 69] By Mr. Engelman:

Q. Now, you say you saw a Dr. Young up there, did you?

A. Yes, sir.

Q. Did he examine you?

A. Yes.

The Court: How much did the chiropractor ask you for each time?

The Witness: Three dollars.

Q. What did you pay Dr. Young?

A. $2.

The Court: In all $2.

The Witness: Yes, sir.

Q. Did you spend any money for the purchase of any medicines or medical supplies of any kind?

A. Well, I bought gauze and that sort of thing and oils—I tried everything.

By the Court:

Q. How much did you spend for gauze and oils?
A. I never kept a record, your Honor.
Q. About.
A. I don't know. Five or ten dollars at least.
Q. Did you spend any other money for any other purpose?
A. I was also to a specialist, Dr. Robinson.
Q. When and where?
A. I went to Dr. Robinson. My attorney has the receipt. I went to him after and upon the advice of Dr. Young.
Q. When did you go to Dr. Robinson?
A. I am not sure of the date. It was some time in February. The latter part of February I should say.
Q. Of which year?
A. 1937. It was after I went to Dr. Young.
[fol. 70] Q. How often did you go to see him?
A. I went just once. He is a specialist.
Q. And did you pay him?
A. Yes, sir.
Q. How much?
A. $3.
Q. Where is he?
A. In Providence, Waterman Street.
Q. Can you think of any other money that you paid to anybody?
A. No, sir.

The Court: If you know of anything, bring it out.

By Mr. Engelman:

Q. Before you left for Rhode Island, that is just following your treatment at Hudson and Jay Street Hospital, did I send you to a Dr. Hodgskin in Brooklyn?
A. You did.
Q. Did he examine you?
A. He examined me and took X-ray pictures.

The Court: When was that?
Mr. Engelman: That was in September of 1935, your Honor.

By the Court:

Q. Did you pay him anything?
A. No, sir.

By Mr. Engleman:

Q. Just tell us at the present time what you notice, if anything, in connection with your physical condition when you [illegible] your work, your trade of carpentry?
A. I am limited to certain reaches.

[fol. 71] The Court: Speak louder.
The Witness: I am limited to certain limitations of movement. I can move only in certain ways.

By the Court:

Q. You mean your whole body or your arms or legs?
A. I can't bend over only so far, and if I lift anything or do any manual labor at all like cement work, I can't do that at all, because it just doesn't agree with me.
Q. Have you got any limitation of motion of your hands?
A. No, sir. I can use my hands, but in the using of my hands I notice when I drive nails over my head, in putting up my hands in driving nails, after I have done it for ten minutes I have got to sit down; I can't stand it any longer.
Q. You have pain?
A. If I stoop down to the floor I can only do that for so long a time and I have got to stop. I couldn't do any shoveling that is necessary for cement work, and that sort of thing and I had to go back to any brother who understands and lets me get away without doing too much of that.

By Mr. Engelman:

Q. What do you notice about lifting?
A. I can't lift as I used to.

By the Court:

Q. Can you lift something very light?
A. Oh, yes, but I mean to say that in my line of work [fol. 72] I can't lift a bag of cement. I can do it, but it hurts me—it bothers me to do it.
Q. When you say it hurts you, do you mean you got pain?
A. Yes, sir.

Q. Where did you get the pain?
A. Right through the lower region of my spine and hip.

By Mr. Engelman:

Q. And you computed approximately the number of days that you have worked since the occurrence of this accident on June 2nd down to the present time?
A. Approximately 340 or 350 days.

By the Court:

Q. As a carpenter? Carpentry work?
A. Yes, sir, every bit of it.
Q. How many days?
A. Approximately 340 or 350 days.
Q. Were you paid anything?
A. Oh, absolutely.
Q. How much?
A. On the P. W. A. jobs I got 90 cents an hour and on one of them I got $1 an hour. On another job I got 78 cents an hour. At the Pontiac Finishing Company and the one I held with my brother—and as I have stated I just did light work—when I got 65 cents an hour.
Q. That is with your brother?
A. Yes.
Q. How much were you paid?
A. 65 cents an hour.
Q. Do you know how much you got paid in all?
A. That I don't know. I have kept no record, your Honor.

[fol. 73] By Mr. Engelman:

Q. During the period of time that you haven't been working what does it cost you a day to live?
A. $2.50 at least.

The Court: You say "while he was not working." Did it cost you less while you were not working?
The Witness: No.
The Court: Didn't he have to live while he was working as well as while he was not working?

Mr. Engelman: With respect to that I had the feature of maintenance and cure in mind. That is the reason I framed the question in that way.

By the Court:

Q. How much does it cost you to live a day?

A. $2.50 a day.

Q. It doesn't make any difference whether you work or don't work?

A. No.

Q. It costs you $2.50 a day to live whether you are working or not?

A. Yes.

By Mr. Engelman:

Q. During all this time that you were not working, that is, excluding the 340 or 350 days during which you were working, were there any days that you felt able to work but didn't because you didn't have work or was it because you weren't able to work?

[fol. 74] Mr. Potter: I again object to that, your Honor.

By the Court:

Q. When you were working with the P. W. A. did you work regularly?

A. No. I started out as a bridge carpenter in Exeter. At first I started with my brother as a carpenter and inside finisher from January 24th to March, and then I left for two weeks in March and went back again. I tried to go back to work again.

Q. Why did you leave there?

A. Because of the fact that my back bothered me.

Q. And you stayed away a week?

A. Yes.

Q. And then you went back?

A. After I was rested again, and I felt that my back wasn't going to give me any trouble, I went back, but I had to do the same thing. I had to stop work again, and that continued. My brother was going on a cement contract and I wanted to help him but I couldn't do it, so I left my brother and went to work—it was a peculiar work. We were to put in 4 x 6 plywood panels. At the employ-

ment office it was understood—I told them—I didn't tell them what had happened or anything, but just that I had an injury and I couldn't do any hard or heavy lifting, and it was understood that I would get light work and I got light work to a certain extent. When it was heavy I couldn't do it. When they commenced to take down the I-beams and stringers I couldn't work there; I had to quit.

Q. While you worked there at light work how long did you work?

A. About a month.

[fol. 75] Q. And did you work there steadily?

A. Yes, sir. I didn't lose a day. When it got into the heavy work—I don't mean to say that I shirked—the fellows I worked with understood, and they helped me. The same way in the Pontiac Company and the same way on every job I went on.

Mr. Engelman: That is all.

The Court: We will adjourn until tomorrow morning.

(Adjourned to June 9, 1937, at 10:30 a. m.)

New York, June 9th, 1937,
10:30 o'clock a. m.

(Trial resumed)

HERBERT AUGUSTUS SMITH, JR., resumed the stand.

Mr. Potter: Any further questions, Mr. Engelman?

Mr. Engelman: No, no further questions.

Cross-examination.

By Mr. Potter:

Q. Mr. Smith, how old did you say you were?

A. 34. I will be 35 on my next birthday, September 13. I was born in 1904—I should say 1902.

The Court: You must speak louder, Mr. Smith.

Q. Near Providence?

A. In Greenwood, Rhode Island, where I live now.

[fol. 76] Q. Is that a suburb of Providence?

A. Yes, sir. It is eight miles outside of Providence.

Q. In 1933 what were you working at?

A. I worked as a bus driver for the New England Transportation Company. I worked for the Collette Tours. I worked as a bus driver between Providence, Rhode Island and the World's Fair in Chicago.

Q. Now, previous to going to sea you worked as a carpenter; is that correct?

A. Yes, sir. I worked as a carpenter from 1923 or approximately 1923 to 1928. At that time the depression hit everyone. My next best bet was a job as a chauffeur or an operator for the New England Transportation Company.

Q. About how many years did you work as a carpenter?

A. Well, I spent seven years—I should say up until the present time, seven or eight years.

The Court: As a chauffeur?

The Witness: As a carpenter.

Q. You were around buildings?

A. Yes, sir.

Q. Worked on scaffoldings?

A. To a certain extent, yes, sir.

Q. And you were accustomed to climbing around about buildings during the course of construction?

A. Yes, sir.

Q. Now, there came a time when you went to sea, is that right?

A. Yes, sir.

Q. What was the first ship you were ever on?

A. I signed on the S.S. Tiger on February 2, 1934.

Q. And prior to that you had never been to sea?

[fol. 77] A. Only around my home on small fishing craft.

Q. But you had been around small fishing craft at Providence?

A. Yes, sir.

Q. So that you were familiar with the water?

A. Well, inland ports, not the sea. That is Narragansett Bay.

Q. I am quite aware of that. But you were familiar with the water?

A. Yes, sir.

Q. And then you went to sea as an oiler or a wiper?

A. I started as wiper aboard the Tiger, and on August 22, I was made a fireman on that ship. I was on that ship from

February 2, 1934, to November, 1934, when I was discharged with malaria fever.

* * * * * * *

[fol. 78] Q. How long did you say you were ill?

A. Approximately seven or eight days, possibly ten days at the most.

The Court: That is all you were ill? Seven or eight days?

The Witness: Approximately, yes, sir. About one week.

Q. And how long did you remain with the S.S. Tiger?

A. I was with the S.S. Tiger from February 2, 1934, to November 20, 1934.

Q. And during the time you were there, did you work in the engine room?

A. I did, yes, sir, as a wiper and fireman.

Q. And you were about the engine room all the time you were doing that kind of work?

A. Yes, sir.

Q. So that you acquired a familiarity with the engine room of the S.S. Tiger, did you not?

A. Yes.

Q. Subsequently you joined the S.S. Yankee Arrow, isn't that true?

A. That is right.

Q. When was it you joined the S.S. Yankee Arrow?

A. April 1, 1935—pardon me, April 24, 1935.

[fol. 79] Q. And in what capacity did you serve after you joined the S.S. Yankee Arrow?

A. As an oiler.

Q. What did you do aboard the S.S. Yankee Arrow?

A. It was my duty to feel of the engines and oil them, as well as the auxiliary machines, the ice machine and the generators, and so forth.

Q. After you joined the Yankee Arrow, did you remain with her up to the time of the accident?

A. I did, yes, sir.

Q. And you wor'ed about the engine room?

A. I did.

Q. About how tall are you, Mr. Smith?

A. 5 foot 6 or 5 foot 7, I am not sure.

Q. About how long a reach have you, do you know?

A. I could not be sure.

Q. Do you mind stepping down here so that we can find out? Extend both your hands, please—your other hand.

Mr. Potter: According to my measurements, Mr. Engelman, to the tips of his fingers, it is 61 inches, and to the palm of his hands—hold them up again, please, Mr. Smith—to the palm of his hands 57 inches. That is all, will you take the stand again, please.

Q. As you went about your work in the Yankee Arrow, you had no difficulty in reaching any parts of the machinery that you had to care for, did you?

A. There were some parts that were quite difficult to reach.

Q. Because of the fact that you had a short reach?

A. I assume so, yes, sir.

[fol. 80] Q. You think you have a short reach?

A. Well, the average reach, I say.

Q. You say you have the average reach?

A. I would say I had—I am about the average height.

Q. Where was the S.S. Yankee Arrow when you joined her?

A. Somewhere in the Gulf, off the Coast of Florida.

Q. And you remained with her until when?

A. I remained until we docked in Beaumont, Texas.

Q. In June?

A. Yes, sir.

Q. Are you able to tell me about when it was that you were in Baltimore, Maryland?

A. About the 27th of May—on or about the 27th or 28th; I believe we left the 28th day of May.

Q. Prior to leaving Baltimore, had you been afflicted with jaundice?

A. I had, yes, sir.

Q. Were you treated there in Baltimore for jaundice?

A. I was.

Q. Do you recall at this time the name of the doctor who treated you there?

A. I do not. I went to the Shipping Office there and he sent me to this private doctor.

Q. About how long were you treated for jaundice?

A. When I went over there, he gave me some pills, and he said, "You are all right, the jaundice is all over," and pronounced me fit for duty for sea.

By the Court:

Q. Did you go there just once?

A. Yes.

Q. And he gave you some pills?

A. He gave me some pills to take along with me on the voyage.

[fol. 81] By Mr. Potter:

Q. When you started on this voyage, were you suffering from jaundice?

A. No, sir; I had been previous to this voyage.

Q. But you had recovered from that, is that correct?

A. Yes, sir. There really was no suffering; I simply saw yellow spots in front of my eyes and I wondered what that was. When I went to see the doctor, he asked me if I had ever had any tropical fever. He diagnosed the case and said it was all from the jaundice, but he said that is absolutely all over now.

Q. You say that you had spots before your eyes, do I understand?

A. Yes, sir, that was previous to this voyage.

Q. Did you have any dizzy spells?

A. No, sir.

Q. You were never afflicted with dizzy spells?

A. On the previous occasion when I had malaria I had dizzy spells and chills.

By the Court:

Q. When was that?

A. Just previous to the malaria fever, I had dizzy spells, yes, sir.

By Mr. Potter:

Q. Prior to June 7, 1935, had you had any accident of any kind?

A. No, not to my knowledge.

Q. Did you engage in any scuffling a day or two before the accident, with any men on the ship?

A. I don't understand your question.

Q. Well, do you know what "scuffling" means?

A. No, I do not.

[fol. 82] Q. Do you know what a fight is?

A. Yes, sir.

Q. All right, put it that way, did you have a fight on board the ship with anyone?

A. I had an argument, but there was no fight.

Q. I mean a physical encounter, put it that way; did you?

A. Not really a fight, we had a little argument.

Q. I don't mean just words, I mean did you have a physical encounter with anyone?

A. No, sir.

Q. Isn't it a fact that just a day before or a few days before, you had a scuffing or fight with someone there in the engine room and you had to be separated by Chief Lawson?

A. Absolutely not. We had an argument in the mess-hall. A Spanish fellow——

Q. There was no such occurrence, is that true, in the engine room?

A. Not in the engine room, it was in the mess-hall.

Q. You did have it in the mess-hall, but not in the engine room?

A. There was no fight. We did not get that far.

Q. There never was any occasion when you had to be separated by Chief Lawson?

A. No, sir.

Q. You are confident of that?

A. Absolutely.

Q. You are confident that you were not pushed up against the side of the ship or the machinery or the rail?

A. I was restrained; I was held by a couple of seamen, but we did not get to fighting; Chief Lawson wasn't even there.

Q. There was an occasion when you were held back by some of the seamen, is that right?

A. That is right.

Q. And that was up in the mess-hall?

A. Yes.

[fol. 83] By the Court:

Q. You were held back; did I understand you to say that you were held back?

A. Yes, sir. They grabbed us both. This Spanish fellow could not understand English, and he thought that I had insulted him.

By Mr. Potter:

Q. You understand English, don't you?

A. Yes.

Q. How far did you go in school, as a matter of fact?

A. I went to my third year in high school.

Q. And this occurrence took place up in the mess-room?

A. At the mess table.

Q. On that occasion were you shoved over or shoved against anything?

A. No, sir.

Q. You were not?

A. No, sir.

Q. You did not fall over anything?

A. No, sir.

Q. And before any blows were exchanged, you were grabbed by someone and restrained, is that right?

A. We were both held, yes, sir.

Q. I am not concerned with the other man, I am concerned with you; did anyone hold you?

A. Yes, sir.

Q. Two seamen?

A. Two seamen, Walter Harrison and George Boutier.

By the Court:

Q. Did you strike any blows?

A. No, sir, we did not get that far.

Q. You did not strike a blow either?

A. No, sir.

[fol. 84] By Mr. Potter:

Q. And this took place at the mess table?

A. At the mess table and thereabouts, yes, sir.

Q. And Chief Lawson was not there?

A. Not at that time. He came down later. They sent for him.

Q. Did you have any other altercation of this character while you were aboard the Yankee Arrow on this voyage in question?

A. I never did. I got along fine with all of the seamen except this one fellow that could not understand English.

Q. So there was no occasion on which you were pushed against anything or wrenched by anybody?

A. No, sir, absolutely not.

Q. Mr. Smith, I show you a photograph which has been marked Plaintiff's Exhibit 1——

* * * * * * *

I understood you to say yesterday that you had your right [fol. 85] foot on a step-plate that is marked with the figure 1, is that correct?

A. Yes, sir.

Q. That is where you had your right foot?

A. Yes.

Q. And you had your left foot at the point indicated by the figure 2?

A. Yes, sir.

Q. And that with your left hand you had hold of the slush pan?

A. Yes.

Q. That is indicated on this photograph by the figure 4, and that as you stood in that position your right hand was free?

A. My right hand was in the oil well.

Q. But it was not grasped to anything; it was free?

A. Yes, sir.

Q. And it was with that right hand that you intended to feel?

A. Yes, sir.

Q. Is that correct, sir?

A. Yes, sir.

Q. And what, if anything, is there shown in that photograph that you felt or you were about to feel?

A. I was feeling of the main drive shaft of the propeller shaft.

By the Court:

Q. What is that?

A. The main drive shaft of the propeller shaft.

Q. Is that there, the picture of the main shaft?

A. That is right there; it travels through this bearing which connects it to the I. P., L. P. and the two intermediate parts here.

Q. Where is that located in that photograph?

A. It is not there; it goes through this assembly (indicating).

By Mr. Potter:

Q. It goes through here?

A. Yes, sir.

[fol. 86] The Court: That is the main shaft that goes through the propeller?

The Witness: The propeller shaft, yes, sir.

Q. And that you were to reach with your right hand; is that correct?

A. Yes, sir.

Q. About how far over was that?

A. I should say 30 inches, 2 foot 6.

Q. And how far was it would you say from this slush pan where you had your left hand and which is indicated on this photograph by the figure 4?

A. Do you mean from the slush pan to the journal?

Q. Exactly so.

A. About 4 feet.

Q. About 4 feet?

A. I would say so. I never measured it.

Q. Now, Mr. Smith, let us see if I thoroughly understand you. You say you were standing up there with your right foot where No. 1 is?

A. Yes.

Q. You had your left foot over where No. 2 is?

A. Yes.

Q. And you had your left hand right over there in the slush pan?

A. Yes, sir, that is right.

Q. You say that you stood with your right foot on No. 1?

A. Yes, sir.

Q. With your left foot over here on No. 2, is that right?

A. Yes.

Q. You had your left hand on the slush pan?

A. Right here (indicating).

Q. You mean to say that the slush pan as you stood in this fashion was on the right side of your left hand?

A. Yes, sir.

Q. As a matter of fact, wasn't the slush pan away back here (indicating)?

A. No, sir.

[fol. 87] Q. You are confident of that?

A. Absolutely.

Q. And do you mean to say that when you stood with your

right foot on No. 1 and your left foot over here on No. 2 and your left hand on the slush pan, it was right along at your side?

A. You get the wrong impression. You are standing this way. I was standing that fashion (indicating). I wasn't standing this way. I was standing like that. Here was the step plate right here and my left foot was on the journal support.

The Court: Was your hand out?

The Witness: It was about in this fashion.

Q. Get back where you were before. Put your right foot here.

A. Just as I am.

Q. Start here. Put your right foot here.

A. Yes, sir.

Q. Now, put your left foot that way.

A. It was higher, of course.

Q. Where was the slush pan?

A. Right about here.

Q. At your side?

A. Yes, approximately.

Q. So that you mean to tell us that when you had your foot, your right foot, at the point indicated by No. 1——

A. Yes, sir.

Q. And your left foot at the point indicated by No. 2 that the slush pan was right at your side?

A. There it is. You can see it from this.

Q. I didn't ask you that; I asked you if that is what you mean to say.

A. Yes, sir, that is what I mean to say.

Q. Now, do you mean to say that that slush pan was not behind so that you had to stick your left hand clear behind you?

A. No, sir.

[fol. 88] Q. That isn't true?

A. No, sir; it is right there (indicating).

Q. There is no question at all about your being perfectly familiar with this situation shown here in this photograph, is there? You had been there before?

A. Yes, sir.

Q. You have seen it before?

A. Yes, sir.

Q. You had done this oiling before? I have.
Q. You have done this feeling of the bearing before?
A. Yes.
Q. It was perfectly light there? You could see?

The Court: Was the room light?
The Witness: To a certain extent, your Honor.

Q. But you could see?
A. Yes, sir.
Q. Now, I call your attention to the photograph Plaintiff's Exhibit 1, and to the letter G made thereon and ask you what that G means?
A. That is the grab-iron on the column.
Q. That is the grab-iron on the column?
A. Yes, sir.
Q. You say that you couldn't use that grab-iron to feel the bearing?
A. Absolutely not, sir.
Q. And why was that?
A. Because of the fact that it was too far back and in order to hang onto that grab-iron and feel of the bearing at the same time you would have to reach cross-arm.

By the Court:

Q. Are you right handed?
A. I am; but on that particular ship you would have to use both hands.
Q. Which arm did you use?
A. Both hands. There are two sides on the engine. In [fol. 89] feeling of the left hand side of it you feel with your left hand, and in feeling of the after side of the ship you feel with your right hand.
Q. Did you have anything in your hand?
A. Just a piece of waste, a piece of cloth.
Q. In which hand?
A. In my left hand. That is what we used to hang on.

By Mr. Potter:

Q. I want you to understand perfectly what I am asking you and if you don't, don't answer. You have indicated here with the letter F what is known as the floor plate.
A. Yes, sir.

Q. And with the letter G what is known as the grab rail?

A. We call it the grab-iron or the hand-rail.

Q. All right. Let us call it the hand-rail then. Do you mean to tell me that you can't stand on this floor plate, grasp this hand-rail with your right hand and feel that bearing?

A. No, sir.

Q. And the reason is because the distance is too great?

A. That and the reason that you are reaching cross-arm.

Q. I am asking you why you couldn't do it this way—grasp this hand-rail with your right hand and feel that bearing?

A. In doing it that way in case of the lurch of the ship you would go right into the crank and it would kill you.

Q. And that you say is a more dangerous way to do it than to stand on this plate and put your right foot over and reach back?

A. There is no reaching back; you reach by your side, put your hand thusly and put your hand back again (indicating).

[fol. 90] Q. You say it is physically impossible to grab the rail there, stand on this floor plate there, and reach with your left hand to feel the bearing?

A. Absolutely.

Q. It couldn't be done?

A. I could never do it.

Q. And that is because of the distance?

A. Yes, because of the conditions.

Q. Well, the condition you refer to was the distance of the reach?

A. Because of the cross-arm. You can not reach cross-arm.

Q. Suppose you tried to do it without reaching cross-arm. Suppose you grabbed the handrail with your right hand and reached this way with your left hand?

A. Then you couldn't do it because of the fact that you couldn't reach down in. You couldn't get down in 8 or 9 inches, unless you were a contortionist.

Q. You say that couldn't be done?

A. Not by myself. I haven't the power of reach for that distance.

Q. You have the average reach, as I understand it?

A. Yes, sir.

Q. Now, did you ever see anyone attempt to feel the bearing in the way you described that you did it?

A. All of them. In fact, there was one oiler who used a box to reach the cross section. He couldn't reach it any other way.

Q. And your claim is that that is the correct way to do it?

A. That is the way I was taught to do it, yes, sir.

By the Court:

Q. Who taught you?

A. The oiler taught me to become an oiler.

[fol. 91] Q. On that ship?

A. Not on that ship; on the China Arrow.

Q. Everything on that ship was the same type as the China Arrow?

A. Approximately the same type. The only difference is that this is a self-feeding ship, it has automatic lubricators.

By Mr. Potter:

Q. And you want us to understand that you couldn't stand on this floor plate right here as shown on this photograph, Plaintiff's Exhibit 1, and do all the oiling or whatever oiling and feeling was necessary?

A. No, sir.

Q. You couldn't do that?

A. No, sir. Some of it you could, but not all of it.

Q. I mean all of it.

A. No, sir.

Q. Mr. Smith, you say that there was a bracket beneath this step plate which has been marked with the figure 1?

A. Yes, sir.

Q. And that is indicated on this photograph by the letter A?

A. Yes, sir.

Q. That is the point?

A. I can't see that.

Q. And it was a bracket that supported that step plate?

A. Yes, sir.

Q. It was underneath it?

A. Yes, sir.

Q. Is that correct, sir?

A. Yes, sir.

The Court: It was underneath?

The Witness: It was underneath, yes.

Q. And that bracket was there when you first joined the Yankee Arrow?

A. It was.

Q. You had observed that prior to June 2nd?

A. Yes, sir.

[fol. 92] Q. I understood you to say that you had observed it when the ship was at Erie Basin?

A. Yes, sir.

Q. And on that occasion you observed that it was loose? The bracket?

A. That is right.

By the Court:

Q. Loose? Out of place?

A. Yes, sir.

Q. Which was it?

A. It was loose.

By Mr. Potter:

Q. And the ship was there at the yard for repairs?

A. To the engine only.

Q. How long were you there at Erie Basin?

A. I don't recall.

Q. Did I understand you to say that you called the first assistant's attention to this bracket? You called Mr. Turner's attention to it?

A. Yes, sir.

Q. And you told him that the bracket under this step plate was loose and out of place?

A. Both the bracket and the plate were loose.

Q. Both the bracket and the plate were loose?

A. Yes.

Q. So that the picture, this photograph which has been marked Plaintiff's Exhibit 1, so far as the bracket is concerned, does not show the situation or condition as it existed on June 2nd?

A. No, sir.

Q. It does not?

A. No, sir.

Q. And the difference is the absence of a bracket which you say was there?

A. There are several other differences also.

Q. But I am directing your attention particularly to this bracket.

A. Directly under that plate there was an oil gate valve [fol. 93] for oil refinery on board the same ship.

Q. I am directing your attention, if I may, please, to the bracket.

A. Yes, sir.

Q. You say there was a bracket there but the bracket is not shown in the photograph?

A. No, sir.

Q. And that there was a bracket there?

A. Yes.

Q. At all the time that you were on the steamship Yankee Arrow?

A. Yes, sir.

Q. And that you are confident of?

A. Yes, sir.

Q. How frequently had you had occasion to use this step plate?

A. On every watch every twenty minutes of the hour. By that I mean that I made a round every twenty minutes, and there were four-hour watches.

Q. And every twenty minutes you stepped up onto this plate?

A. Yes, sir.

Q. You mean that?

A. Yes, sir.

Q. At every twenty minutes?

A. Approximately every twenty minutes.

Q. While you were on watch you stepped up on this step plate?

A. Yes, sir.

Q. And on each occasion you stepped up in the manner which you have described at the time of the accident?

A. Yes, sir. You become familiar with using one way, and I did it one way and that is the way I did it.

Q. And that was your way of doing it?

A. Yes, sir.

Q. And that was the way you did it every twenty minutes you were on watch?

A. Yes, sir.

Q. I direct your attention to the floor plate which you have [fol. 94] indicated on the photograph which you have before you and that you have indicated with what symbol?

A. With the letter F.

Q. That was the usual type of floor plate, was it not?

A. Yes, sir.

Q. There was nothing unusual about that floor plate, was there?

A. Nothing, no, sir.

Q. You testified yesterday afternoon, in response to questions by your counsel, about falling on an angle iron, is that right? Did you say that you fell against an angle iron?

A. Well, I felt my back——

Q. Sir?

A. Yes, sir, I felt my back strike this angle iron.

Q. Which side of your back was it? The right side or the left side?

A. On the right side in the middle of my back.

Q. Middle of your back?

A. Yes, sir.

Q. Is the angle iron against which you fell shown in the photograph which you hold in your hand which is marked Plaintiff's Exhibit 1?

A. Yes, sir.

Q. It is?

A. Yes, sir.

Q. Is there a mark on the angle iron against which you fell?

A. There isn't any on this photograph, no sir.

Q. Will you mark with the letter Z the angle iron against which you say you fell?

Mr. Engelman: I object to this. He has already done this on Plaintiff's Exhibit 2 where it is better illustrated. I don't see why he should do that again. I have no objection except that it may result in some confusion.

[fol. 95] Q. I show you the photograph that is marked Plaintiff's Exhibit No. 2 and direct your attention to the letter L and ask you if that shows the angle iron against which you say you fell?

A. Yes, sir.

Q. And is the letter L at approximately the place where you say you fell?

A. Well, that is at the left side of the position that I fell, yes, sir.

Q. But it is about the spot?

A. Yes, sir.

Q. As I understood you to testify yesterday, you said that you were about to step back onto the floor plate and you swung your left foot back?

A. There was no swinging, sir. I simply stepped down.

Q. You were about to place your left foot——

A. I was about to step down.

Q. You were about to step down and in stepping you purposed stepping first with your left leg and foot?

A. Yes, sir. My left foot was out of position to step any other way.

Q. And as you stepped down your left foot caught against this bracket?

A. It struck the bracket.

Q. The bracket underneath the step plate?

A. It wasn't underneath the step plate; it had come loose with the vibration and momentum of the ship and came out underneath to a certain extent where I struck it with my left foot.

Q. So it was protruding beyond the step plate?

A. Yes, sir.

Q. How great a distance?

A. I couldn't be sure.

Q. Give us some approximation, can't you?

A. A few inches or so.

[fol. 96] Q. A few inches?

A. Yes, sir.

Q. So that as you stepped down and drew your left foot back——

A. Yes, sir.

Q. —it struck this bracket?

A. Yes, sir.

Q. And that threw you?

A. It did.

Q. And you fell over backwards?

A. To the best of my recollection I fell over like that (witness snaps fingers). The next I knew I was just laying on the floor of——

Q. Do you mean to tell me that you were unconscious?

A. Well, I was not unconscious——

Q. Was there any time that you were unconscious during this accident?

A. I did faint. I don't say that I was unconscious, but I did faint.

Q. You did faint?

A. Yes, sir.

Q. Well, Mr. Smith, did you faint away or not?

A. Yes.

Q. You did faint away?

A. Yes, sir. I am quite sure I did.

Q. You are quite sure you did?

A. Yes, sir.

Q. And when you regained consciousness you were lying on your back?

A. No, sir.

Q. Where were you?

A. I was under the ventilator. I was under the ventilator, and the first assistant had taken me out of the bilges and helped me to the ventilator. They have got a ventilator shaft.

Q. Where were you when you lost consciousness? Just in the act of stepping back?

A. No, sir, I lost consciousness when I got out of the ventilator, after I had been taken out of the bilges. This ventilator is a system——

Q. I am quite familiar with ventilators. I didn't ask you about ventilators. I am now concerned with the time you [fol. 97] claim you lost consciousness. Do you understand that question?

A. Yes, sir.

Q. All right. Now tell us if you will, when you claim you lost consciousness?

A. I fainted when I was put under the ventilator after being taken out of the bilges.

Q. And you were in the bilges?

A. Well, yes, sir, to a certain extent.

Q. You claim you were in the bilges?

A. To a certain extent.

Q. To what extent were you in the bilges?

A. I don't know. It happened so quick, how do I know?

By the Court:

Q. Give us the dimensions of the floor plate. That may help. You fell on the floor plate?

A. I struck the floor plate.

Q. What are the dimensions of that floor plate?

A. In that particular spot about 18 inches or 20 inches wide and about 3 or 4 feet in length and about 6 to 8 feet deep.

By Mr. Potter:

Q. Do you know what a floor plate is?
A. Yes.
Q. Will you look at your photograph?
A. Yes.
Q. Will you look at Plaintiff's Exhibit No. 2 where you marked L for the angle iron?
A. Yes, sir.
Q. What is the width from that point L up to the point where that drops down?
A. I should say about four or five feet.
Q. Four or five feet?
A. Yes, sir.
Q. Did you fall above this floor-plate there?
A. No, sir.
Q. You did not?
[fol. 98] A. No, sir. I hit against the angle iron just below the floor-plate. That is not shown on the picture here.

By the Court:

Q. Is that a picture of the room the way it was when you met your injury?
A. Yes.
Q. There was a floor-plate there?
A. Yes.
Q. What you call the bilges is below the floor-plate?
A. Yes, sir, that is in this section (indicating).
Q. You fell down in the bilges on the side of the angle iron nearest the shaft, is that it?
A. No, nearest the engine room; I fell nearest the shaft which is down in the side there.
Q. On which part of the bilge did you fall or which side of the floor-plate did you fall, the angle iron side of the floor-plate or did you fall into the bilges on the other side of the floor-plate?
A. On the other side of the floor-plate.
Q. The angle-iron side?
A. Yes, sir.

Q. You struck the angle-iron side, then you did not fall between the floor-plate and one of the bilges?

A. No, sir, this is the angle-iron here, and this is the floor-plate, and I went down there (indicating).

Q. Down the bilge?

A. Yes, sir.

Q. Near the shaft?

A. Yes.

Q. The shaft side of the floor-plate?

A. Yes, sir, that is correct.

By Mr. Potter:

Q. The engines were in motion, were they not?

A. They were.

Q. You were at sea?

A. Yes, they were turning up 82 times a minute.

[fol. 99] Q. Did you fall in head first?

A. That I could not be sure of.

Q. Who got you up?

A. The first assistant, Mr. Turner.

By the Court:

Q. Did he get down into the bilge?

A. No, he got me up from the floor-plate.

By Mr. Potter:

Q. How did he get you up?

A. I suppose he grabbed me by the foot, I don't know.

Q. Don't you recall; don't you know how he got you up?

A. He grabbed my arm and foot.

Q. And dragged you out?

A. Yes.

Q. Was anyone else present at the time?

A. No.

By the Court:

Q. When he got you out, you were underneath the floor-plate?

A. Partly so, yes.

Q. Did you say partly so?

A. Yes, sir.

Q. Was your whole body below the floor-plate?

A. Part of my body was sort of hanging down there.

Q. What part of your body was above the floor-plate and what part was below the floor-plate?

A. My back and stomach I would say were below and my feet were sticking up.

Q. Did you go in head first?

A. I sort of tumbled in.

Q. We don't want to be confused, and you should not be. [fol. 100] You say you fell, and you fell by the side of the shaft, is that right?

A. Yes, sir.

Q. Did you fall head foremost or feet foremost?

A. Sort of back and head foremost.

Q. Do you know what part of your body touched the bilge? Do you know what stopped you from falling further?

A. This angle-iron beneath the bilges.

Q. Are there angle-irons below the bilges?

A. Yes, there are many of them.

By Mr. Potter:

Q. Where is this angle-iron?

A. It runs and connects some part of the manifold; there are several over there.

Q. How far distant is it from the angle-iron which you marked with the letter L on Plaintiff's Exhibit No. 2?

A. I should say two to three feet.

Q. And is it an angle-bar similar to the one you marked with the letter L on Plaintiff's Exhibit 2?

A. It is, with the exception of the floor-plate—there are no floor-plates beneath the bilges.

Q. And that is what arrested your fall, is that correct?

A. That is correct.

Q. And that was about two feet?

A. Two to three feet.

Q. Two to three feet lower than the floor-plate shown in the photograph which has been marked Plaintiff's Exhibit No. 2?

A. Yes, sir.

Q. Is it not a fact that you slipped on the floor-plate shown in the photograph, known as Plaintiff's Exhibit No. 2 and fell right out on the floor-plate?

A. Absolutely not.

[fol. 101] Q. You are confident that you fell down into the bilges?

A. I did.

Q. And that your fall was arrested by this angle-bar, is that correct?

A. Yes, sir.

By the Court:

Q. Was there any oil on the floor or on the steps?

A. There is always more or less oil there, sir.

Q. And that cannot be avoided?

A. They wiped off, but not very often.

Q. You did not slip, did you?

A. No.

By Mr. Potter:

Q. Your claim is, as I understand it, that your foot, your left foot, as you came back caught against a bracket, is that right?

A. It struck this bracket, yes, sir.

Q. It struck this bracket and that caused you to be thrown?

A. Yes, sir.

Q. That is your claim?

A. Yes, sir; that is what happened.

By the Court:

Q. You did not slip then?

A. No, sir.

By Mr. Potter:

Q. You were assisted to your feet by Mr. Turner, were you?

A. That is right.

Q. And then you sat under the ventilator, is that right?

A. Yes.

Q. For how long a period of time did you stay there?

A. I could not be sure.

Q. And at that time, did you notice any injury to your left hand?

A. Yes, sir.

[fol. 102] Q. You barked the knuckles of your left hand, is that right? You had an injury to your left hand, being a scratch or an abrasion on the knuckles of your left hand?

A. Yes, sir.

Q. Isn't that correct?
A. That is correct.
Q. Do you mean to claim that when you sat there under the ventilator, that you were dazed?
A. I was.
Q. Sir?
A. I was, yes, sir.
Q. While you were sitting under the ventilator, you fainted away, is that what you say?
A. I did, yes, sir.
Q. And someone revived you?
A. Yes, it was my fireman; he is here now.
Q. You were revived by your fireman?
A. Yes, sir.
Q. Do you know what his name is?
A. Mr. Latour, Johnnie they call him.
Q. He then assisted you up the ladder to the deck?
A. Yes, sir.
Q. Did anyone else assist you?
A. From there he left me, because he had to go back on watch.
Q. I did not ask you that. I asked did anyone else assist you up the stairway?
A. Two seamen assisted me to the captain's quarters.
Q. I did not ask you who assisted you to the captain's quarters, I asked you who assisted you from the engine room to the deck.
A. The fireman.

By the Court:

Q. After you fainted, you came to, did you?
A. Yes.
Q. Then you went to the upper deck?
A. With the help of a fireman.
[fol. 103] Q. Who helped you between the time that you came to and left this deck and went to the upper deck, who was with you?
A. Just the fireman.

By Mr. Potter:

Q. The fireman you say?
A. Yes, sir.

By the Court:

Q. How did you go up the steps of the ladder; was it a regular ladder——

A. It was a regular ship's ladder.

Q. With rungs or steps?

A. With steps.

By Mr. Potter:

Q. Steps and platforms up to the deck, is that correct?

A. Yes.

By the Court:

Q. With side rails?

A. Yes.

By Mr. Potter:

Q. There were three stairways and three platforms?

A. That is right—two platforms.

Q. Before you came to the upper deck?

A. Yes, sir.

Q. Do you know how many decks the S.S. Yankee Arrow has?

A. Yes.

Q. How many?

A. It has a lower deck and an upper deck.

By the Court:

Q. How many steps did you take from the floor on which you fell up to the main deck, how many steps were there?

A. Possibly 40; I could not be sure, but possibly 40 steps.

[fol. 104] Q. I don't care about the exact number, but quite a number?

A. Yes, quite a number.

By Mr. Potter:

Q. How many decks did you say the Yankee Arrow has now, one, two or three?

A. It has two, but there is——

Q. How many decks, that is all I asked you. How many decks, that is all there is to it; how many, one, two or three?

A. Two.

Q. Two decks?

A. It has two decks and an upper deck, of course, but it has other decks, too, it has a pump deck, but that hasn't got anything to do with this, then it has a pilot deck——

Q. Mr. Smith, if you will just answer my questions, we will get along a good deal better and a good deal quicker.

The Court: Yes, just answer the questions as he puts them to you. Counsel asked you if you know how many decks there are on this ship.

The Witness: Yes, sir.

Mr. Potter: Here is a man who claims to be a seaman and he does not even know how many decks there are on the ship on which he was employed.

The Witness: There is the main deck, there is a between-deck, poopdeck, after-deck, bridge-deck, there are several decks on every ship.

Q. Now then, when you came up this stairway, what deck did you come up to?

[fol. 105] A. We came past the cross-hatch, then past the generator, then the main deck; we do not consider decks below——

Q. Wait a minute, I object to any speech, and I ask that the witness be directed to answer the question propounded.

The Court: I suppose he is confused. I may say what was in my mind, not being a seaman, but once in a while being aboard a ship, when we talk about decks they have a certain definite meaning, and I do not divide the main deck from these other places that he mentioned.

Q. Which deck did you come out to, the deck exposed to the weather?

A. Yes.

Q. That is the deck that you call the main deck, isn't it?

A. That is, yes.

Q. You came up the stairway and went through a door, stepped out on the deck exposed to the weather, which you call the main deck, is that right?

A. That is right.

Q. There the fireman left you?

A. Yes, sir.

Q. Is that correct?

A. He left me with two seamen.

Q. And the seamen were standing right there on the main deck?

A. Yes, sir.

Q. Is that right?

A. There are always a number of seamen on the after-deck.

Q. I did not ask you where a number of seamen always were, I asked you whether two seamen were standing right on the main deck when you stepped out with the fireman, is that right?

A. There were seamen on the main deck——

[fol. 106] Q. Were there two seamen standing there when you stepped on the main deck?

A. The question is indefinite, I don't know what you mean.

Q. Were they there on the main deck, two seamen?

A. Yes, sir, there are always seamen on the main deck.

By the Court:

Q. The main deck is the large place?

A. Yes, sir, in this particular type of ship, you come up on the main deck; in this particular part of the ship you find seamen there always, because that is where they recline after hours. All the seamen were there, and it was there that they took me, naturally.

Mr. Potter: If your Honor finds that it is going to be so confusing, I will bring a model of the ship here.

The Court: I think it would be well to do that.

Mr. Potter: Very well, I will bring a scale model of the S.S. Yankee Arrow here.

The Court: Either a model or a definite picture so that he can identify it, and he probably will be able to do it from a model. I notice when you asked were there seamen standing right there, that is rather indefinite.

Mr. Potter: Very well; I will have a model of the ship brought here.

[fol. 107] By Mr. Potter:

Q. Had you ever seen these two or three men before?

A. Yes, sir.

Q. What were their names?

A. Walter Harrison and George Boutier.

Q. What were their second names?

A. Walter Harrison and George Boutier, I believe it was.

Q. You had seen them prior to this occasion?

A. Yes.

Q. Have you ever seen them since?

A. I have not, no, sir.

Q. They went up to the captain's room with you?

A. They did, yes, sir.

Q. When the fireman left you and you joined these two sailors, did I understand you to say that you were bleeding profusely?

A. I was bleeding, naturally, I don't know how long I stayed there, but I know I was bleeding.

Q. What part of your body was bleeding?

A. The lower part of my right side, my hip.

Q. Was there any blood on your left hand?

A. Yes, to a certain extent.

Q. Was that bleeding?

A. Some, yes.

Q. Were you all covered with blood?

A. Not all covered with blood, no.

Q. Was there blood all over your hand?

A. The tips of my fingers, yes, sir.

A Juror: Will you speak a little louder, please.

The Witness: The tips of my fingers, yes.

Q. Do you know a Mr. McKeegan?

A. I do.

[fol. 108] Mr. Potter: Will you stand up, Mr. McKeegan?

Q. Did you see him when you came to the engine room?

A. I think he helped me to my quarters. He was one of the firemen that brought me my meals, and so on.

By the Court:

Q. Was he the man that went up with you?

A. Not went up with me, no.

By Mr. Potter:

Q. You saw him on this occasion, did you?

A. I did.

Q. And he went up to the captain's room; the captain's room is located about midships forward or midships of the bridge, is that correct?

A. Yes, sir.

Q. And after you saw the captain, you then returned to your quarters?

A. Yes, sir.

Q. Is that right?

A. Yes, sir.

Q. Where were your quarters located?

A. In the forward part of the ship.

Q. Did these two sailors walk with you from the captain's room to your quarters?

A. They did.

Q. Do you mean to say that you were unable to walk unassisted?

A. Well, yes, to a certain extent.

Q. To a certain extent, you were unable to walk unassisted?

A. Naturally, I was weak.

Q. And you were unable to walk unassisted, that is why [fol. 109] the firemen accompanied you up the stairway?

A. Yes, sir.

Q. When you saw Mr. McKeegan, you were unable to walk unless assisted, is that what you mean to say?

A. Yes, sir.

Q. After you returned to your bunk—you say your bunk was located in the forecastle part of the ship?

A. Yes.

Q. Is that right?

A. Yes.

Q. Did you have an upper bunk or lower bunk?

A. I had an upper bunk.

Q. After you went into your upper bunk, did you leave it during that day or that evening?

A. Just once.

Q. Once?

A. That next day I left.

Q. You did not leave the upper bunk until the next day?

A. Yes.

Q. That would be the 3rd of June?

A. Yes, sir.

Q. Did anyone assist you getting down from your bunk?

A. Yes, sir.

Q. Who?

A. Roy Mal ne, the wiper.

Q. And you were unable to get down without assistance?

A. Yes, sir, I could get down, but I could not get up.

By the Court:

Q. Without assistance you could get down?
A. He helped me down.
Q. Did you get down without assistance?
A. He was there and he helped.

By Mr. Potter:

Q. Did you testify yesterday that on the third, that would be the day after this accident, that Chief Lawson and Mr. [fol. 110] Turner came up to you at your quarters while you were in the bunk and visited you?
A. Yes.
Q. You are confident of that?
A. They did not visit.
Q. They came up to see you?
A. Yes, sir.
Q. You are confident of that?
A. Yes, sir.
Q. And they talked to you?
A. Yes, sir.
Q. At that time, was your hand bandaged?
A. I believe I had at least a tape on both fingers, yes.
Q. Who put or tied it on?
A. One of the seamen. I don't recall who it was; there was quite a few that helped me.
Q. And there was some adhesive tape on the knuckles of your left hand?
A. Yes, sir.
Q. Is that right, and two fingers?
A. Yes, sir.
Q. How long did Chief Lawson and Mr. Turner remain there?
A. About two minutes.
Q. And then you did not see them again?
A. No, sir.
Q. The next day the ship arrived at Beaumont?
A. Yes, sir.
Q. You got up and dressed yourself?
A. No, sir.
Q. Do you mean to say that you were unable to dress yourself?
A. Yes, sir, I was lame and I could not move my legs.
Q. Where were you lame?

A. In the lower part of my legs and my back naturally.

Q. How about your left hand?

A. That didn't hurt half as much as my back.

Q. You had two suitcases, didn't you?

A. I did, yes.

[fol. 111] Q. Did you pack them?

A. No, sir, I had help.

Q. Were you unable to pack them?

A. I could take the stuff out of my locker because it was the top locker, but I could not stoop down.

Q. You could not stoop down?

A. That is right.

Q. You are confident of that?

A. Yes.

Q. And you are confident that you did not pack those two suitcases yourself?

A. Yes, sir.

Q. You went ashore there at Beaumont, did you not?

A. I did, yes.

Q. And you were paid off there?

A. Yes.

Q. And didn't you carry those two suitcases yourself when you went ashore?

A. No, sir.

Q. You are confident of that fact?

A. Yes, sir.

By the Court:

Q. Didn't you carry either of them?

A. No, sir.

By Mr. Potter:

Q. That was because you were unable to carry them?

A. Yes, sir. I did not feel that I was able to.

Q. You did not try to carry them, did you?

A. I tried to carry the larger one. I tried to pick one of them up; I don't recall which one.

Q. Now, isn't it a fact that you walked off the ship and you took those two suitcases yourself and no one assisted you at all?

A. One of the sailors is right in this room that helped me carry them.

[fol. 112] Q. Will you answer my question; when you went ashore, did you not carry both those suitcases yourself, isn't that true?

A. It is not.

Q. It is not true?

A. No, sir.

Q. About what time of day was it when you went ashore?

A. I should say around one.

Q. About one o'clock?

A. About one in the afternoon; I would not be so sure; I don't recall exactly.

By the Court:

Q. When did you land?

A. I should say between ten and eleven in the morning.

By Mr. Potter:

Q. After that you went to see some doctor, is that correct?

A. Yes, sir, at the Magnolia Oil Fields at Beaumont.

Q. You went to see the doctor at his office?

A. Yes, sir.

Q. How long did you remain there?

A. I should say about a half hour or forty-five minutes.

Q. Did you go to see that doctor again?

A. I have, yes, sir.

Q. On that day you made just one visit, is that correct?

A. Just one visit that day, yes.

Q. Where did you go after you left the doctor's office?

A. I immediately went to Beaumont and reserved seats on the Interurban train for Galveston, Texas.

Q. Did you have the two suitcases with you?

A. I did.

[fol. 113] Q. Did anyone carry them for you or were you carrying them yourself?

A. George Boutier was carrying them for me.

By the Court:

Q. Did you carry either?

A. No, sir.

By Mr. Potter:

Q. What time did you leave for Galveston?

A. I left in the afternoon.

Q. What time did you arrive at Galveston?
A. I got there that night late.
Q. What did you do that night?
A. I went to a hotel.
Q. You did not go to a hospital, did you?
A. I went to the Edison Hotel, I believe it was.
Q. What time did you go to the hospital?
A. Eight o'clock the next morning, I took a cab.
Q. You took a cab?
A. I did.
Q. You took the two suitcases with you?
A. I did.
Q. You walked in when you went to the hospital, did you not?
A. Yes, sir.
Q. And you entered the hospital then on what date?
A. June 5.
Q. June 5th?
A. Yes, sir.
Q. When you went into the hospital, did you give a history of your troubles or your difficulty to the person in charge at Galveston?
A. They had a form that they wanted me to fill out and I did give them the history of my life.
Q. You told them about your suffering from jaundice?
A. I told them about everything, measles, smallpox, and so on.
Q. And you were suffering at that time from jaundice, [fol. 114] were you not?
A. Not at that time, no, sir.
Q. Not when you entered the hospital at Galveston?
A. No, sir, they told me the same as the doctor in Baltimore told me. They said that was all over; I had them, but it was all over; that it was the aftermath.
Q. While you were at Galveston, you were not treated for jaundice, were you?
A. Not to my knowledge, no, sir.
Q. You were not?
A. No, sir. They gave me salts; if that is what it was for, I am not really sure.
Q. You gave them no history of suffering at that time from jaundice?
A. I explained to them about the malaria and what I had previously, and so on.

Q. Did you tell them that at that time you were suffering from jaundice?

A. Not at that time, no, sir.

Q. You didn't tell them that?

A. No, sir, I told them that I had had jaundice and the doctor in Baltimore told me that I had had jaundice on May 28th.

Q. And your impression is that when you were at the Galveston hospital that you were not treated for jaundice?

A. Not unless as I say, the salts were for that.

Q. That is your impression?

A. Yes, sir, that is.

Q. While you were at the hospital, were you operated on?

A. I was the last week I was there.

[fol. 115] By the Court:

Q. You say you were operated on while you were there?

A. Yes, the last week I was there.

Q. That was at Galveston?

A. Yes, sir.

Q. What do you mean by that; what operation did you have?

A. A circumcision.

By Mr. Potter:

Q. You were in condition so that you felt that you could be operated on, were you not?

A. Yes, sir, I had been in that condition several times since.

Q. You felt well enough to be circumcised, didn't you?

A. Yes, sir.

Q. Your jaundice wasn't bothering you then, was it?

A. No, sir, it wasn't bothering me when I entered the hospital.

Q. Your back was not bothering you, was it?

A. To a certain extent, the same as it does now; some days it is all right, and the next day it isn't.

Q. That is, it is intermittent, is that right?

A. Yes.

Q. Is that what you mean?

A. Why, yes.

Q. Did you make any complaints about that back condition when you were in Galveston?

A. Absolutely, that is what I went there for.

Q. While you were there you were circumcised, weren't you?

A. Yes, sir.

Q. But you were not treated for jaundice?

A. Not unless, as I have said before they gave me salts for jaundice; there was no other treatment.

[fol. 116] Q. How long did you remain at the hospital?

A. From June to July 13th.

Q. Prior to being discharged on July 13th, you retained a lawyer, did you not?

A. I talked with a man in regard to getting in touch with the company for transportation for home.

Q. Didn't you retain Mr. Mandell?

A. Yes.

Q. While you were still at the hospital at Galveston?

A. The day I came out of there.

Q. As a matter of fact, didn't you engage him several days before you left the hospital?

A. I talked to him and had the secretary write a letter to the office: I had written, too, and called up, but to no avail.

Q. You had a talk with him?

A. I did.

Q. Now, before leaving the hospital, did you try to get them at the hospital to change their diagnosis?

A. I did not try anything; why should I try anything?

Q. Did you have any talk with them as to what sort of certificate they would give you?

A. No, sir.

Q. You did not?

A. No, sir.

Q. Did you afterwards write them asking if they would change their clinical record?

A. No, sir, I wrote them for——

Q. Did you or did you not?

A. No, sir.

Q. Now then, Mr. Mandell's office is where?

A. In Houston.

Q. Houston, Texas?

A. Yes, sir.

Q. So that after leaving the hospital you went over to Houston to see Mr. Mandell, didn't you?

A. I went there as an out-patient of Dr. Moore's office.

Q. You went to Houston to see Mr. Mandell?

[fol. 117] A. I talked to Mr. Mandell while I was in Houston.

Q. While you were in Houston, you were treated meantime as an out-patient?

A. Yes.

Q. That is all?

A. Yes.

Q. That is all you were treated, three times?

A. About once a week, yes.

Q. And that treatment consisted of what?

A. Oil treatments, massages and adhesive tape and strapping for my back.

Q. Strapping for your back?

A. Yes.

Q. You had walked out from the hospital for the treatment, or clinic?

A. Yes, sir, one block.

Q. You had no difficulty in walking?

A. Oh, yes, I did.

Q. Oh, you did?

A. Yes, sir.

Q. When you left the hospital at Galveston, you had no difficulty in walking, did you?

A. Absolutely.

Q. You did?

A. I was quite lame.

Q. You were lame?

A. Yes, sir, when I came north I was much lamer.

Q. You say you believe when you left the hospital in Galveston you were unfit for work?

A. Yes, sir.

Q. Is that your belief?

A. Yes, sir.

Q. You know, do you not, that the doctors at Galveston said when you were discharged on July 13th that you were fit for work and duty?

A. Yes, sir.

Q. Don't you know that?

A. Yes, sir.

Q. But you went over to Houston and you had these three treatments?

A. After the train ride, I could hardly walk at all.

[fol. 118] Q. Did anybody accompany you when you went from the train to Mr. Mandell's office?

A. Just the cab driver who took me up there.

Q. You don't know what his name is?

A. Of course not.

Q. You never saw him before and have never seen him since?

A. No.

Q. You don't know anybody that saw you when you were there at Houston, with the exception of the men at the clinic and Mr. Mandell?

A. That is all.

Q. Shortly after that, you came to New York, did you not?

A. Yes, sir.

Q. You did?

A. Yes, sir.

Q. That was about August 4th?

A. August 12th, I believe. I left Texas August 4th, I believe.

Q. When?

A. We left Beaumont, Texas, August 4th, I think.

Q. You then came up here?

A. Yes, sir.

Q. And then did you have any treatment here in New York City?

A. I did, yes, sir.

Q. Where did you have that treatment?

A. I was treated as an out-patient at Hudson and Jay in New York.

Q. What was the character of the treatments there?

A. The same as I got in other clinics. I was treated with massages and therapy, that is heat on my back and then they had to make a belt form.

Q. Do you remember the names of the doctors who treated you at Hudson and Jay Streets?

A. I don't, no.

Q. How many times did you go there?

A. I went there from August 22nd to September 4th, I believe.

[fol. 119] Q. Tell us, if you will, Mr. Smith, the doctors beginning with the day after the examination, the doctors who have seen you, examined you or treated you; now, the first you say was Dr. English, is that right?

A. It is either Dr. English or Dr. Brownrick.

Q. You do not recall which?
A. No, I do not.
Q. That was at Beaumont?
A. Yes.
Q. That is one doctor?
A. Yes, sir.
Q. Not two?
A. No. It is just one doctor.
Q. And then you went to Galveston?
A. Yes, sir.
Q. And there you were treated by a Dr. Flory?
A. No, sir.
Q. While you were treated at the Galveston hospital?
A. Yes.
Q. How many doctors saw you there?
A. My doctor, Dr. Slaughter admitted me, then Dr. Leach, I believe it was, was my doctor with the exception of the last week I was there and then Dr. Flory looked at me.
Q. Do you know Dr. Flory?
A. Yes.
Q. Do you recall seeing him there at Galveston?
A. I do.
Q. So that there was one doctor at Beaumont and some three doctors over there at Galveston?
A. Yes, sir.
Q. Is that right?
A. Yes, sir.
Q. And then you went back to Houston?
A. Yes, sir.
Q. And you saw a Dr. Moore?
A. Dr. Moore, yes, sir.
Q. That makes five doctors you saw in the south before coming north?
A. Yes, sir.
[fol. 120] Q. Is that right?
A. Yes, sir, I also returned back to Dr. English or Dr. Brownrick.
Q. That is the same doctor; that is not a new one, is it?
A. That is true.
Q. You also know that X-rays were taken there of you at Galveston, isn't that true?
A. Yes.
Q. Of your back?
A. Yes.

Q. When you came up north of Hatteras and came to New York, how many doctors did you see?

A. I saw two doctors at Hudson and Jay.

Q. Do you recall what their names are?

A. I don't but my attorney has my discharges?

Q. But you don't know?

A. I don't know.

Q. So that is seven doctors, is that right?

A. Yes, sir.

Q. Then there came a time when you went to see some doctor at your attorney's suggestion, is that correct?

A. Yes, sir.

Q. What is his name?

A. I am not sure, I think Hodgskin. I believe he is here in the courtroom.

Q. He was the eighth doctor?

A. Yes, sir, to the best of my belief.

Q. He was the eighth doctor you had seen?

A. Yes, sir.

Q. Do you mean to tell us at the present time, Mr. Smith, that you cannot work as an oiler?

A. I doubt that I could.

Q. You have never been aboard ship working as an oiler since the accident, have you?

A. No, sir.

Q. You have been aboard ship, haven't you?

A. Yes, I took a boat ride this last Summer to Oak Falls.

[fol. 121] Q. You have been aboard ship, haven't you?

A. Yes, that is true.

Q. As a matter of fact you have been aboard the Yankee Arrow, haven't you?

A. Yes, I have.

Q. And you went aboard her at Providence?

A. I went aboard at Providence, yes, sir.

Q. You have never worked, however, as an oiler?

A. Not since the accident, no, sir.

Q. Do you mean to say that you cannot reach up at the present time?

A. I could but with difficulty.

Q. Well, you cannot reach with your right arm?

A. Yes, I can.

Q. Can you reach with your right arm?

A. I can, but with difficulty.

Q. Can you reach with your left arm?
A. The same.
Q. Can you bend over?
A. To a certain extent I can, yes, sir.
Q. To a certain extent?
A. Yes, sir.
Q. You have to reach when you work as a carpenter, don't you?
A. I do, yes, sir.
Q. And you are able to do it?
A. No, I am not able to do it.
Q. But you do and you are able to bend over?
A. To a certain extent, yes, sir.
Q. Well, to what extent?
A. I can get down to three-quarters of the way, then I have to stop.
Q. You mean you can nearly touch the floor bending over?
A. Yes, sir.
Q. Can you?
A. Yes, sir.
Q. Could you touch the floor before this accident happened?
A. I could palm the floor, yes, sir.
[fol. 122] Q. You could palm the floor?
A. Yes, sir.
Q. Now, you can barely touch it, is that correct?
A. Yes. I don't say that I cannot touch it, I can, but it would be with difficulty. It would bother me.
Q. You were paid off at Beaumont, weren't you?
A. That is right.
Q. And you were paid off the wages which were due you at the time?
A. Yes, sir.
Q. Is that correct?
A. Yes, sir.
Q. When you started north, your transportation was given, isn't that true?
A. They put me on a ship as a passenger, yes, sir.
Q. And in addition to that they gave you $20.
A. Yes.
Q. Isn't that true?
A. Yes, sir.

Q. Now, Mr. Smith, when you went up to see the captain did you tell him how you had been injured?

A. I did, yes, sir.

Q. I show you this paper and I call your attention to the name Herbert A. Smith which appears in the lower left-hand column, and ask you if that is your signature?

A. Yes, sir.

Q. And is that a paper that you signed before you left the ship?

A. I signed it, but that was in blank.

Q. Do you mean to say there was no writing on it when you signed it?

A. Absolutely no.

The Court: There was none on it?

The Witness: None, no, sir.

Q. Why, Mr. Smith, how far did you say you went to school, the third year in high school?

A. Yes, sir.

[fol. 123] Q. You don't make a practice of signing blank papers, do you?

A. No, sir.

Q. As a matter of fact, that was not a blank paper when you signed it, was it?

A. It certainly was. I signed the original and my attorney has the original. This paper was a blank; he asked me to sign it, but it doesn't matter, it has the truth on most of it.

Q. It is a truthful statement, isn't it?

A. To some extent it is.

Q. Read it over and see if there is anything that is not truthful.

A. It says here, "He slipped on the floor plate." That isn't so. I did fall between the No. 4 barrier and the L. P. eccentric.

The Court: Just tell us what is not so. You needn't repeat what is so.

The Witness: That is the part where I slipped.

Q. Anything else? Read it carefully.

A. This part of it about bandaged, I was not bandaged by any officer of the ship.

Q. And with that exception is that paper a correct statement of what occurred?

A. I beg your pardon, sir?

Q. I say, with the two exceptions that you have just spoken of, is the paper correct?

Mr. Engelman: I object to the form of the question on the ground that it leads to confusion. He has already stated how the accident happened.

The Court: If you object to it, he can ask every one of [fol. 124] these questions over again.

Mr. Engelman: I have no objection to having counsel proceed to take the paper and question the witness with respect to each and every item, but I do object to that question.

The Court: I will have to admit it if it is offered in evidence. It is signed by him. Is there anything else you want to add?

The Witness: It is the general outline.

Q. Mr. Smith, at the time you signed this paper, you knew that you were signing a report of the accident, did you not?

A. No, I could not say that I do.

Q. You read English, don't you?

A. I do, yes, sir.

Q. Look at the paper and see if you mean to tell us that you did not know what you were signing?

A. I tell you, I was told to sign——

Q. No, I will ask you to answer my question if you please. Do you mean to tell us that in spite of the fact that you can read English and had a high school education that you did not know that you were signing a report of this accident?

A. Yes, sir, I knew it.

Q. You knew that?

A. I knew I was signing a report in blank, not the report—a report in blank.

Q. But you knew that that paper had certain printed questions on it?

A. It had nothing on it, I know that.

Q. The printed portions I am referring to.

[fol. 125] By the Court:

Q. Did you sign that in lead pencil here?

A. Yes.

Q. There is another lead pencil notation, is that your writing?

A. No, sir, that is not. I was only interested in getting off the ship and getting to the hospital.

By Mr. Potter:

Q. But that is the paper which you signed, is that correct?

A. Yes, sir, with nothing on it.

Mr. Potter: All right. I offer it in evidence.

Mr. Engelman: I object to its admission into evidence on the ground that it appears from the testimony of the witness that he signed a blank paper, therefore the contents of the paper offered in evidence are not binding upon him.

The Court: Mark it for identification at this time.

(Marked Defendant's Exhibit A for identification.)

By the Court:

Q. Everything in that paper you say is correct but those two things which you mentioned?

A. Yes.

The Court: You can take this paper and ask him every [fol. 126] other question, and take the time of the Court doing it—"What is your name in full?"

The Witness: Herbert A. Smith.

Mr. Engelman: I am willing to save the time of the Court, so I will consent to its admission in evidence. I withdraw my objection and consent to its admission.

(Defendant's Exhibit A for identification received in evidence.)

Mr. Potter: No further questions.

Redirect examination.

By Mr. Engelman:

Q. Now, Mr. Smith, I show you a paper on a blank form of this defendant, the Socony-Vacuum Oil Company, Inc. Will you tell us if your signature is on the bottom of that document?

A. Yes, sir, it is.

Q. And will you tell us, if you will, who prepared the written information set forth on that document?

A. The third mate, R. Little; the third mate of the Yankee Arrow.

Q. After he prepared it, did you sign it?

A. I did, yes, sir, to get my wages.

Mr. Engelman: I offer it in evidence.

The Witness: That is the one that I signed.

By the Court:

Q. Whose handwriting is that on the back of it?

A. On the back of it? It is mine.

Q. How many pages did you sign?

A. I don't recall how many.

[fol. 127] Q. Did you sign two?

A. Two anyway.

Q. Did you know when you signed them?

A. I signed that one when I paid off the ship, to get my money.

Q. Which one?

A. The last one.

Q. What day did you leave the ship?

A. June 4th.

Q. And on June 4th you signed that one?

A. Yes, sir.

Q. And when did you sign the other?

A. I am not sure. I believe right after the accident, the blank.

Juror No. 7: May I ask a question, your Honor?

The Court: Ask it, yes.

By Juror No. 7:

Q. Mr. Smith, your bunk was in the forecastle?

A. Yes, sir, the forward forecastle.

Q. And isn't an oiler supposed to be considered a petty officer?

A. Yes, sir.

Q. Don't the petty officers sleep apart from the crew?

A. Not on this ship. They sleep apart, but the bunks are all designed in the forward part of the ship.

Juror No. 7: Thank you.

(Short recess.)

The Court: Did you offer that in evidence?

Mr. Engelman: Yes; that is where we were when we took a recess. I now offer it in evidence again.

Mr. Potter: I object to it on the ground that it is a self-[fol. 128] serving statement, it is not properly authenticated, and is not a document proved to have been made in the regular course of business, and there is no evidence here that entitles it to be admitted as an admission against this defendant.

By the Court:

Q. Did you see who wrote that statement?
A. The third mate who paid me off.
Q. What is his name?
A. R. Little.
Q. How many copies did he make of it?
A. Two. That is the copy.
Q. Is that a carbon copy?
A. Yes. That is the copy. He has the original.
Q. He has the original?
A. Yes, sir.

The Court: Serve notice to produce on the defendant and subpoena an officer to bring the original back. Mark it for identification.

(Marked Plaintiff's Exhibit 3 for identification.)

The Court: Then, if he swears to it possibly you will get that in and overcome the objection. Just now it is self-serving.

By Mr. Engelman:

Q. Was this document, Plaintiff's Exhibit 3 for identification, made out aboard the Yankee Arrow?
A. Yes, sir.
Q. And at that time where was the vessel?
A. Tied up at the dock at Beaumont.
Q. And it was made out by whom?
A. The third mate.
[fol. 129] Q. And in what part of the ship was it made out?
A. Made out in his cabin.

By the Court:

Q. Were you the only man in the cabin at that time?

A. I believe there was either the engineer or one of the oilers there at the time. There were several around within the immediate vicinity.

Q. Were you the only one making a statement?

A. Yes. The third mate wrote it out and asked me to read it and then I signed it after I read it.

Q. You say he made two copies?

A. He has the original and I have the copy.

Q. Did you sign the original?

A. Yes, sir. That is the carbon copy of the original.

By Mr. Engelman:

Q. And this is your signature?

The Court: Yes. We got all that. Do as the Court tells you. Serve notice to produce and subpoena some officer to bring the records.

Q. On cross examination you were questioned by defendant's counsel in connection with spots with respect to your eyes. Now, just tell us about that. Were these spots before your eyes, or were they on your eyes?

A. On my eyes. I had little yellow discolorations on the eyeball.

Q. Was anything on your eye that impaired your vision?

A. None whatsoever.

Q. How do you know you had these little yellow spots?

A. My attention was first called to it on the China Arrow. [fol. 230] Some of the seamen mentioned it to me and then in looking in the glass I noticed it.

Q. Was that at the time you had this malaria fever?

A. It was shortly after that.

Q. That you developed these spots?

A. Yes, sir.

Q. And after you had this attack of malaria fever were you at any time examined by any doctor for this defendant company?

A. I was examined in Baytown by a doctor.

Q. That was about how long after this attack of malaria fever?

A. About a week after.

Q. And was that examination made in connection with a trip on some boat of this defendant company?

Mr. Potter: That is objected to as irrelevant.

The Court: I will have to sustain the objection. Reframe your question.

Q. This examination that was made after this attack of malaria fever, where was it made?

A. It was made aboard the Tiger in Baytown, Texas.

Q. And at that time were you signing on for some voyage on the Tiger?

A. I had signed on. It was to make a return trip on the Tiger that we were interested in.

Q. And was that by a doctor of this defendant corporation?

Mr. Potter: That is objected to as calling for a conclusion.

The Court: Objection sustained.

[fol. 131] Q. Who was the doctor that made the examination? Do you know?

A. I believe his name was Kenyon; I am not certain. The examination was made before the captain and the first mate.

Q. And were other members of the crew examined at that time?

A. No other members but myself.

Q. Now, when you got back to New York, when you left the Motorship Aurora, before you went to the Marine Hospital at Hudson and Jay Streets did you see a physician?

A. I did. I went to a doctor at 21 Pearl Street, the shipping office there.

Q. And what shipping office is that at 21 Pearl Street?

A. The Standard Oil—the Standard shipping office.

Q. That is an office maintained by this defendant corporation, is it?

A. I believe so, yes, sir.

Q. How did you happen to go there?

Mr. Potter: That is objected to as to how he happened to go there.

The Court: Yes, I think that is asking for a conclusion.

Q. Did anyone send you there?

A. Yes, sir. Upon arriving in New York I went to Mr. Courtade, who is here at the present time, and talked to him

about a transportation home. I was interested in a home where I could get care, and he sent me to 21 Pearl Street.

Q. What did that doctor do, if anything?

A. He examined me and told me to take sun baths and he also strapped my back.

Q. Does an oiler do any other work aboard ship other [fol. 132] than the mere reaching to feel bearings and parts of the ship that must be lubricated?

Mr. Potter: That is objected to, unless the contention is that this witness is qualified as an expert on the duties of an oiler? Is it your contention here that he is qualified as an oiler or is it your contention that he is a carpenter?

Mr. Engelman: Our contention is that he is qualified to act as an oiler.

Mr. Potter: Then, I withdraw the objection.

Mr. Engelman: And our contention is further that he is qualified to act as a carpenter.

The Court: Do you still object?

Mr. Potter: I say I withdraw my objection.

The Court: He withdraws his objection, all right.

Q. (Read.)

A. Yes, sir. In dock, when you dock, and on all trips, and on many occasions the bearings have to come down for taking the lead readings and then they have to be put back in place again, and then there are such things as grinding valves and putting in gaskets and many other things that have to be done after the completion of every voyage.

The Court: Do the oilers do that?

The Witness: They do it, yes. The oilers and engineers do it. They do it under the supervision of the engineers. [fol. 133] The first assistant has charge of the engines and gaskets. The second assistant has charge of the taking them down and reading the lead and the third has charge of the electricity in the ice plants.

. . . . . .

[fol. 134] Q. Aside from the feeling of the moving parts of the engine, is there any manual work required of an oiler aboard a steamship?

A. There is.

Q. Tell us what it is.

A. In taking down and putting up bearings they have graduated nuts on all the bearings and the bearings themselves weigh in the neighborhood of from five to seven hundred pounds apiece. They take them down with chain falls, and they have wrenches that weigh possibly 90 pounds. We have to lift them and we have to take them off with sledge hammers. The valve itself might weigh 40 to 50 pounds. Some might be heavier and some lighter. It is a matter of turning the valves in. We have to reach over our head on some occasions. You have to get down underneath on other occasions. It is a manual job.

The Court: This is all directed toward damages?

Mr. Engleman: That is right, your Honor.

Q. You testified on cross examination as to the manner in which you were reaching in and feeling of this bearing just prior to the occurrence of the accident. Now, were you ever doing that particular job in that way in the presence of any superior officer aboard the steamship?

A. Yes, sir.

Mr. Potter: That is objected to as calling for a conclusion, and I refer particularly to the use of the expression "superior officer." I think that the witness may state what he [fol. 135] has done and what his practice was, but I object to it in that form.

The Court: There is a conclusion—"superior officer."

Q. Who were your superior officers in the engine room?

A. On this particular watch, the first assistant. On the 4 to 8 watch it is the first assistant.

Q. Did you ever feel of this L. P. bearing in the manner in which you were feeling of it just prior to the occurrence of the accident in the presence of the first assistant engineer?

A. Yes, sir. The first assistant checks on everything—on your water and on everything you do. Naturally, a new man, they all check you.

Q. Were you ever instructed by him to do that job in any other manner than the way in which you were doing it just prior to the occurrence of the accident?

Mr. Potter: That is objected to on the ground it is improper in form, it is leading and suggestive, and it amounts to the testimony of counsel.

By the Court:

Q. In the engine room who gave you any instructions? Who directed you as to what to do?

A. They don't direct you; they watch, and if you don't do as you are supposed to do.

Q. Who was in the engine room at times besides you?

A. At times the fireman would come out to get a drink [fol. 136] of water, but he had to go back on watch.

Q. Who else?

A. The first assistant. He was the only man and he was there at all times—not all the time but most of the time.

Q. Was he there when you were hurt?

A. Yes.

Q. When you fell?

A. Yes, sir; right in the vicinity.

Q. Is he in court now?

A. Yes, sir.

Q. Did he see you feel that bearing before?

A. Yes, sir.

Q. Did you feel that bearing in his presence?

A. Yes, sir.

Q. How did you feel the bearings in his presence?

A. The same as I felt them in anyone's presence.

Q. How did you go towards them?

A. You have the same natural way of doing your work, and that is the way I have been taught.

Q. And that is the way you have always done it?

A. Yes.

Q. And that is the way he saw you do it?

A. Yes, sir.

Q. In his presence?

A. Yes, sir.

Q. What are the wages of a carpenter in the State of Rhode Island, where you live?

A. The wages vary. Anywhere from 90 cents to $1.17 an hour for an outside or journeyman carpenter. For a factory carpenter or millwright, it averages from 70 to 78 cents an hour.

Recross-examination.

By Mr. Potter:

Q. Mr. Smith, did I understand you to say yesterday afternoon that when you went up to the captain's office [fol. 137] you were bleeding from all over your body?

A. I didn't say all over; from the right side of my hip and my back.

Q. Did you testify: "I was bleeding from my shoulders to my shoes"?

A. I said there was blood and grease from my shoulders to my shoes.

Q. Didn't you say, "I was bleeding from my shoulders to my shoes"?

A. I don't recall.

The Court: If you did say that, what did you mean?

Q. Didn't you say that the captain told you not to get any blood on his carpet?

A. He did.

Q. And at that time you were bleeding?

A. Yes, sir.

Q. And the blood was dripping from your person?

A. Naturally.

Q. From what part of your body?

A. From the lower part of my back and my hip—the right side of my hip.

Q. It oozed through your clothes and was dripping to the floor?

A. All I had on was dungarees and a pair of socks and a white shirt.

Q. No matter what you had on, it was oozing through these garments and you were bleeding onto the floor?

A. The shirt was torn off me.

Q. Was it bleeding onto the floor or wasn't it?

A. It did, yes, sir.

The Court: Did any blood drip to the floor?

The Witness: Yes, sir.

Q. That was from your back?

A. My back and my fingers.

Q. And your fingers?

A. Yes.

[fols. 138-177] Q. Were you as a matter of fact bleeding from your shoulders to your shoes?

A. I was grease from my shoulder to my shoes.

Q. I beg your pardon?

A. I was bleeding from the lower part of my back and hips, but I was covered in grease from my neck down to my feet.

Mr. Potter: That is all.

Mr. Engelman: No further questions.

[fol. 178] HERBERT AUGUSTUS SMITH, JR., recalled as a witness in his own behalf, testified further as follows:

Direct Examination.

By Engelman:

Q. I show you this paper, Plaintiff's Exhibit 3 for identification. Now that paper was written out by whom?

Mr. Potter: I object to that. It is improper in form.

By the Court:

Q. Did you see anybody write that paper

A. Yes, sir, the third mate.

Q. Who wrote it?

A. The third mate.

Q. What was his name?

A. R. Little.

Q. Did you ever see him write papers before?

A. Yes, sir.

Q. Where and when?

A. Why, in his cabin. At times we paid off before the different mates, the first mate and the captain.

Q. Before you left the ship you paid off?

A. Yes, sir.

Q. Who pays you off?

A. The third mate on this occasion.

Q. Did he ever pay off at any other time?

A. No, sir.

Q. You have never seen him pay off?

A. No, sir. The captain and the first mate paid off at other times.

Q. And this time it was the third mate?

A. Yes, sir.

[fol. 179] Q. Did you ever see him sign any paper on this ship before you were paid off this time?

A. Just a pay voucher.

Q. And you signed that?

A. Yes, sir, on another occasion except this one.

Q. Did you see anybody else paid off that day?

A. No, sir. There wasn't anyone else paid off that day.

Q. I beg your pardon?

A. To my knowledge there wasn't anyone else paid off that day.

Q. Were you paid off that day?

A. Yes, sir.

Q. Were you paid in cash?

A. Yes, sir.

Q. Who gave you the cash?

A. R. Little, the third mate.

Q. The same man?

A. Yes, sir.

Q. Whom did you ask about being paid off?

A. I went to the pilot house, naturally.

Q. You went to the pilot house? Who was in the pilot house.

A. The skipper is supposed to be there, but he wasn't there. He wasn't on board the ship. If he was, I didn't see him.

Q. He wasn't there?

A. Just the third mate, and of course the engineers. The chief engineer and the first assistant was there.

Q. You went to the pilot house?

A. Yes, sir, and the chief engineer signed my discharge. I have it here with his signature right on it.

Q. Were you at anchor when you did that?

A. Yes, sir, and that is the discharge of the chief engineer. He and the third mate were the only men I saw in regards to officers on board the ship.

Q. Did you look for officers?

A. I looked for the skipper.

[fol. 180] Q. Who is the skipper?

A. The master.

Q. When you looked for the master what did you do?

A. Naturally, I went to look for him to get my money.

Q. Where did you look for the master?

A. In the pilot house, naturally. That is where he is.

Q. That is where the officer is?

A. Yes, unless he is on deck reclining.

Q. You went to the pilot house and the master wasn't there?

A. If he was there I couldn't see him. The only man I saw was the third mate.

Q. Where was he?

A. Down in the saloon.

Q. Was anybody in the pilot house?

A. No, sir.

Q. You went to the saloon?

A. Yes, sir.

Q. And you saw the third mate there?

A. The third mate.

Q. What was he doing there when you saw him?

A. I don't know what he was doing. Possibly he was on watch. By that I mean to say the engineers and the mates divide up amongst themselves when they get into port.

Q. What do you mean. He was in the saloon?

A. That is, in the officers' mess or saloon.

Q. What did you do about being paid off?

A. I went to the captain's quarters. Naturally, in New York or in any other port that they pay off the captain and the first mate pay off. The first mate checks your name.

Q. Did you sign the ship's papers?

A. You had to sign them if you want to get your money.

Q. Where are you paid off, at the end of your journey? Are you paid at your destination?

A. Yes, at the end of your journey—if we leave, let us [fol. 181] say from Beaumont for New York, it might have been done at New York, or whatever port we hit on our way north of Hatteras, that is where we are paid off.

Q. Beaumont is south of Hatteras?

A. Yes, sir.

Q. Did you speak to anybody on the ship about being paid off?

A. No, sir.

Q. You did not speak to anybody?

A. Only the third mate. And naturally, I went to the quarters to find the skipper, but he wasn't on board, at least I could not find him.

Q. Did you see the second mate?

A. No, I did not see anyone, only the third mate. I said, "Is the captain aboard?" And he said, "Oh, it's you, Smith." And I said, "Yes." So he said, "What do you

want, your money?" And I said, "I do." He said, "You will have to come in to my office. The captain informed me that you cannot have your money unless you sign a release." I said, "I will sign my pay slip, but I won't say anything else." We argued for quite a while, that is a few moments.

Q. What was said?

A. With regard to signing a release.

Q. Don't say you argued, what was said.

A. He said to me, "You will have to sign these papers" and I said, "All I have to sign is my pay check." You see, they have a long sheet of paper there with the names of all the seamen on it, and you sign that paper opposite your name on that list.

Q. Did he have that list?

A. He did not, no. I said, "I will sign my pay slip." But [fol. 182] he wanted me to sign a blank similar to this one. I signed one for the captain but he wanted me to sign another, so I said, "I will sign this one if it is filled in." So I said, "If I sign that in blank, you can do anything you want with it." So he said, "All right, you give me a statement of what happened on the ship and I will make it out, and you sign it," and that is the way I got my money.

Q. Did he make it out for you then?

A. Yes.

Q. Did he ask you the questions that appear on that slip?

A. Yes.

Q. And you answered them?

A. Yes, he asked me how it happened and so on, the time, the date, and so on.

Q. And you saw him write it down?

A. Yes, I wanted this to be entered because I could not get any entrance to the hospital without it; all I wanted was a discharge; all I wanted was to show that I was on the ship.

Q. Did he give you the money before or after?

A. After.

Q. What were you paid?

A. A little over $20. I am not sure what it was, but I think it was a little over $20.

Q. He paid you in cash?

A. Yes, sir.

Q. You just told the jury something about something having been given to you in blank, and you refused to sign it, is that right?

A. Yes. I did not know what it was that he wanted me to sign; some papers. So I said, "Why sign that? I will sign my pay check"; I did not know what he was getting at.

Q. That was at the same time?

A. Yes.

[fol. 183] Q. You signed another paper, did you?

A. Nothing but this to get me in the hospital, because I told him I wanted something to be admitted to the hospital. I wanted my discharge paper.

Q. What did he say to that?

A. He said, "I am not the doctor, and I am not the captain." So I said, "How am I going to be entered in the hospital? You can give me a report of the accident, can't you?" which he did, and that is it.

Q. Then when you went to the hospital, did you show them that?

A. No, sir, I had that in my suitcase.

Q. How many pieces of paper did he write?

A. Just that one.

Q. Was that in duplicate, that paper?

A. No, this is a carbon of the paper; he has the original copy and this is the carbon copy.

Q. Did you sign the original?

A. Yes.

Q. You signed it before you were paid?

A. Yes, sir.

The Court: I will admit it. Mr. Potter, it seems to me when his ship is in port and a person is authorized to take payment, the master, first mate or any other officer, if a man is hurt, he is taken to the Marine Hospital and apparently paid off, the journey having been ended, either the captain has to be there or if he is not, his representative is. This man represented the master, with the master's knowledge, I would almost infer from the fact that he was paid [fols. 184-185] off; he was authorized to pay off and probably authorized to name the conditions, and the conditions were if he signed the paper for the company, so I think the paper is part of the paying off, and on that theory I will admit it.

Mr. Potter: May I have an exception, sir?

The Court: Yes.

(Plaintiff's Exhibit No. 3 for identification received in evidence.)

Mr. Engelman: No further questions.

. . . . . .

[fols. 186-190] The Court: Plaintiff rests, does he?

Mr. Engelman: Plaintiff rests, yes.

. . . . . .

Mr. Engelman: I withdraw the second cause of action.

Motions to Dismiss

Mr. Potter: The defendant now moves to dismiss the third cause of action on the ground that the plaintiff has failed to establish the cause of action designated—

[fol. 191] I move to dismiss the first cause of action on the ground that the cause of action alleged in the complaint has not been established and that no other cause of action has been established against this defendant and that any injury which this plaintiff may have sustained on the occasion and at the time in question was an injury caused by the ordinary risk of his employment which he assumed.

(Adjourned to June 10th 1937, 10:30 a. m.)

[fol. 192] New York, June 10, 1937; 10.30 a. m.

Trial Resumed

(The following proceedings were had out of the hearing and presence of the jury.)

. . . . . .

The Court: I imagine the first thing to do under the circumstances, which I suppose would be quite satisfactory would be to reserve my decision on the motion to dismiss. Therefore, the rule of the Court is that decision is reserved [fols. 193-200] on the motion to dismiss the complaint at

the end of the plaintiff's case, and defendant is given an exception to that ruling.

* * * * * * *

[fol. 201] Mr. Potter: Now, your Honor, I propose to read the deposition of Captain Ibsen, the master of the vessel. I have a copy which I will hand you if you desire to follow it.

This is a deposition taken by the defendant pursuant to notice under the Revised Statutes, Section 639, Title 28, and the testimony reads as follows:

"S. C. Ibsen, sworn for defendant by notary public testified as follows:

"*Examined by Mr. Potter*:

"Q. What is your occupation, Captain?

"A. Master Mariner.

"Q. And how long have you been going to sea?

"A. Since 1892.

"Q. What certificates do you hold?

"A. Master steamships for any ocean.

"Q. Steam and sail, or just steam?

"A. Just steam, but I have a certificate for sail from another country; and pilot's license, but I suppose that don't count.

"Q. How long have you held a master's license?

"A. Since 1909.

[fol. 202] "Q. Are you attached to any vessel at the present time?

"A. This one.

"Q. What is the name of it?

"A. Motor Vessel 'Brilliant'; or motorship, whatever you call it.

"Q. Are you bound on a voyage to sea at the present time?

"A. Yes, bound for Port Los Angeles, California.

"Q. As master on the 'Brilliant'?

"A. As master on the 'Brilliant,' yes.

"Q. What time did the 'Brilliant' arrive at the Port of Albany?

"A. She arrived yesterday; that is the 31st of March, about 6:00 p. m.

"Q. Now, do you know the S. S. 'Yankee Arrow'?

"A. Yes, I do.

"Q. Were you ever attached to that vessel?

"A. Yes, I was master of her approximately for seven years.

"Q. Now, were you master of the S. S. 'Yankee Arrow' on a voyage commencing at Baltimore on May 28th, 1935?

"A. Yes, sir.

"Q. On that voyage commencing at Baltimore on May 28th, 1935, to what port was the S. S. 'Yankee Arrow' bound?

"A. She was bound to the Port of Beaumont, Texas.

"Q. And on that voyage from Baltimore to Beaumont, you served as master of the S. S. 'Yankee Arrow'?

"A. Yes, sir.

"Q. When was the S. S. 'Yankee Arrow' built?

"A. She was built in Camden, New Jersey, in 1921.

"Q. And where was she classed; at Lloyds?

"A. At Lloyds and American Bureau of Shipping as Class A-1.

"Q. And after original classification, was she inspected from time to time?

"A. Yes, she was inspected annually by United States Local Steamboat Inspectors.

[fol. 203] "Q. And was she also examined for classification?

"A. Yes; she was periodically examined for classification by Lloyds and American Bureau of Shipping.

"Q. And did she retain her classification at the American Bureau and Lloyds of A-1?

"A. Yes, she was rebuilt at Baltimore at that particular time; a new bottom was put in her; she was a class A ship.

"Q. Now, on this voyage which commenced at Baltimore on May 28th, 1935, what can you say as to her being seaworthy?

"A. She was a seaworthy ship.

"Q. In all respects?

"A. In all respects; she was practically as good as a new ship.

"Q. Now, on this voyage which commenced on May 28th, 1935, who were your deck officers; you may look at your log, if you desire, Captain, to refresh your recollection?

"A. The deck officers.

"Q. Who was your Chief Mate?

"A. J. L. Amm.

"Q. And who was your second?

"A. S. A. Hill; and third mate was R. A. Little Chief Engineer was S. Lawson and first assistant engineer was R. L. Turner.

"Q. Will you look at your log please for that voyage and tell us briefly what sort of weather you experienced between Baltimore and Beaumont?"

. . . . . .

[fol. 204] "A. Well, between Baltmore and Beaumont——

"Q. Was there any unusual weather?

"A. General breeze, southerly and south by west 3 (ind.); here in the Gulf there was southerly 2, and 2 and 3; southerly 1 only; practically calm, no wind; 2 and 3; practically fine weather all along.

"Q. Practically fine weather the entire voyage?

"A. The entire voyage; 1 you can just feel is a wind, a slight ripple in the water.

[fol. 205] "Q. And these numerical forces that you have referred to?

"A. That is the Beaufort Scale; just a slight fine ripple on the water.

"Q. What time did you arrive at Beaumont?

"A. We arrived at Beaumont; we arrived at Sabine River at—June 4th at 6:00 A. M. and we took pilot and then we went up the river.

"Q. Up to Beaumont?

"A. To Beaumont; and we arrived at Beaumont, alongside at 12:16 P. M.

"Q. Of what day?

"A. June 4th, 1935.

"Q. Now, aboard the S.S. 'Yankee Arrow,' what logs did you keep; deck logs first, if you please?

"A. Why the deck log; the regular ship's log book.

"Q. A rough log?

"A. Yes, rough log and then copy it over in the extra copy——

"Q. Which is generally termed the smooth log?

"A. Yes, the smooth log.

"Q. And what is the book which you now hold in your hand?

"A. That is the rough log and the smooth log is a copy of the rough log and written in ink; the other is in lead pencil."

(The stenographer thereupon marked the rough log Defendant's Exhibit A for identification of April 1, 1937, A. R. Kirwin; and he marked the smooth log Defendant's Exhibit B for identification, April 1, 1937, A. R. Kirwin.)

(I now offer the leg for this voyage in evidence.)

Mr. Engelman: I would like to see the logs.

The Court: Show them to your adversary.

(Handed to Mr. Engelman.)

[fol. 206] Mr. Engelman: I have no objection providing the pages be specified. This is a log book covering a great many voyages.

The Court: You don't want the whole book in, do you?

Mr. Potter: I offer the portions of the log books identified by the witness relating only to the voyage in question.

Mr. Engelman: No objection.

The Court: They may be received in evidence.

(Marked Defendant's Exhibit C, being the rough log, and Defendant's Exhibit D, being the smooth log.)

Mr. Potter (Continuing reading):

"Q. Now, then, in addition to the officers' deck logs, there were engine room logs, is that right?

"A. Yes, there was an engine room log.

"Q. And that was kept under the supervision of the Chief Engineer?

"A. Yes; I think he has got a rough copy and a smooth log.

"Q. And you had nothing to do with those books?

"A. No, I have nothing to do with those books; the only ones I have are these ones.

"Q. You did keep another log?

"A. Yes.

"Q. And what did you call that?

"A. What is known as the medical log.

"Q. Is the book which you now have in your hand the medical log?

"A. Yes, the medical log."

(The stenographer marked the medical log Defendant's Exhibit C for identification of April 1, 1937, A. R. Kirwin.)

Now, I offer the medical log in evidence and I offer only the entry of June 2, 1935.

[fol. 207] Mr. Engelman: If your Honor please, I object to its introduction until it appears the manner and circumstances under which the entry was made.

The Court: I sustain that objection.

Mr. Potter (Continuing reading):

"Q. Now, directing your attention, if I may please, to the medical log which has been marked Defendant's Exhibit C for identification, by whom were the entries in that book made?

"A. They were made by me.

"Q. And the entries in this book are in your handwriting?

"A. Yes, in my handwriting.

"Q. Does this book contain any entries of occurrences on the voyage of the S.S. 'Yankee Arrow,' which commenced at Baltimore on May 28th, 1935?

"A. Yes.

"Q. I direct your attention in particular to an entry (indicating)?

"A. On June 2nd?

"Q. On June 2nd; is the entry which appears for June 2nd, 1935, in your handwriting?

"A. Yes, it is.

"Q. When was that entry made by you; on the day of its date?

"A. That was the date of the day when the man came up here and was treated with bandage for his finger."

Now, I renew my offer of the log, and I contend that under Section 374a as constructed by 232 App. Div. 226, also reported in 249 Supp. at page 930, that log books are admissible when properly established.

Mr. Engelman: Your Honor, my objection is that the [fol. 208] master of this vessel is attempting to——

The Court: Just one minute. I notice, Mr. Potter—I was impatient and I read in advance of where you are reading, and I noticed you asked him to read the log. If he reads

the log it states the contents: Why do you want the log book in evidence? You say, "Captain, will you now repeat the entry," and he swears to it under oath.

Mr. Potter: I see what you have in mind. That was due to over-caution on my part at the time I took the deposition. I will proceed then.

The Court: All right; I will sustain the objection.

Mr. Potter (Continuing reading):

"Q. Captain, will you now repeat the entry which appears under the date of June 2nd, giving the whole thing?

"A. It reads:"——

Mr. Engelman: Just a minute. I object to the question on the ground that the master of the vessel cannot bind the plaintiff——

. . . . . .

[fol. 209] Mr. Potter: I will put on a witness if you want me to, to show that it was in the regular course of business.

. . . . . .

[fol. 210] The Court: I understand the law to be if it was a transaction done in the regular course of business and the entries were made by one whose duty it was to make such entries, that is sufficient. That goes to the weight; and you can argue it to the jury.

I will allow you to put on somebody.

[fol. 211] Joseph M. Nugent, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Potter:

Q. Mr. Nugent, you are a member of the bar of the State of New York?

A. I am.

Q. What year were you admitted?

A. 1922.

Q. Are you in any way connected with the defendant Socony Vacuum Oil Company, Inc., the defendant in this action?

A. I am the attorney in charge of marine claims.

Q. Since practicing law have you specialized in any particular branch of the law?

A. Yes, sir, in the admiralty end of it.

Q. Are you familiar with marine matters?

A. I am.

Q. And marine law?

A. I am.

Q. Are you familiar with the law with reference to the keeping of deck logs and engineer's logs aboard ship?

A. I am.

Q. Tell us, if you will, please, what the law is in reference to the keeping of a log aboard ship.

Mr. Engelman: Now, your Honor, I object.

The Court: I will sustain that objection.

Q. Are you familiar with the course of business of the ships of the defendant company or the manner in which the ships' business is conducted?

A. I am.

Q. And for how long a time have you been familiar with the records of the defendant company?

A. Almost thirty years.

[fol. 112] Q. And are you familiar with the character of the records and reports kept by the officers in charge of the several ships of the defendant company?

A. I am.

Q. Do you know the ship S.S. Yankee Arrow?

A. Yes, I do.

Q. Is she owned, operated and controlled by the defendant?

A. It is.

Q. Was she in June, 1935?

A. She was.

Q. Do you know of your own knowledge who was the master of the S.S. Yankee Arrow in 1935?

A. Yes, Captain Ibsen was the master of it.

By the Court:

Q. Let me shorten it. Did you ever make a trip on the Yankee Arrow?

A. Not in that particular ship, your Honor, but I have been aboard her many times.

By Mr. Potter:

Q. Did you ever see Captain Ibsen write?
A. Yes, I have, many times.
Q. Are you familiar with his handwriting?
A. I am.
Q. Are you familiar with his signature?
A. I am.
Q. I show you an entry which appears in a book which has been offered in evidence and direct your attention to the entry beginning "June 2nd; H. A. Smith,"
A. Yes, I have read the entry.
Q. In whose handwriting is that entry?
A. Captain Ibsen's.

[fol. 213] By the Court:

Q. Have you been aboard the ship and did you see a log book on board the ship?
A. I have.
Q. When you went aboard the ship you saw the log; were there entries in the log?
A. Yes, there were.

By Mr. Potter:

Q. Are you familiar with the medical logs which are kept by the ships of the defendant?
A. Yes, I am.
Q. Now, if you will look at that book in which that entry appears and tell us if you know what that book is.
A. That is a medical log of the S. S. Yankee Arrow.
Q. Was it the usual course of business of your company to keep medical logs?
A. It was on every ship.
Mr. Engelman: I object to that.
Mr. Potter: I am giving proof under Section 374a.
Mr. Engelman: He doesn't know what the business was aboard the ship, because he wasn't there.
The Court: The question was if it was the regular course of business.

By the Court:

Q. Were you ever on board the Yankee Arrow?
A. Yes, I was, many times.

Q. Did you see logs there?

A. Yes.

[fol. 214] Q. Was there a medical log kept there, do you remember?

A. Yes, sir.

Q. Are you sure there always was?

A. Yes, sir.

By Mr. Potter:

Q. And was it the usual course of business to keep medical logs aboard the S. S. Yankee Arrow?

A. Yes, sir.

Q. Can you tell us what the book which you now hold in your hand is?

A. It is the medical log of the S. S. Yankee Arrow.

Mr. Potter: I now renew my offer.

Mr. Engelman: I still object to it. There is nothing to show how the contents of the documents were made.

The Court: The law says at the time of the occurrence or a short time thereafter.

Mr. Potter: The deposition of the captain states when it was made.

The Court: Oh, it does?

Mr. Potter: Yes, sir. Now, may I repeat briefly—I have read it in already:

"Q. On June 2nd; is the entry which appears for June 2nd, 1935, in your handwriting?

"A. Yes, it is.

"Q. When was that entry made by you; on the day of its date?

"A. That was the date of the day when the man came up here and was treated with bandage for his finger."

The Court: I will admit it and give the plaintiff an exception.

[fol. 215] Mr. Potter: That is all, Mr. Nugent.

(Marked Defendant's Exhibit E.)

Mr. Potter: Your Honor, according to my record I stopped at the end of page 7. The question propounded was:

"Q. Captain, will you now repeat the entry which appears under the date of June 2nd, giving the whole thing?

"A. It reads: 'June 2nd; H. A. Smith; Oiler; Abrasions on right hip and back, also bruised knuckle on left index finger—claims while feeling No. 4 main bearing, he slipped on floor plates, falling between No. 4 main bearing and L. P. eccentric, a distance of approximately two feet. (Off Florida Keys).'

"Q. Now, this portion which you have just read to us, Captain, appears under what column?

"A. Description of case and location of vessel. This was off or near the Florida Keys; about off Tortugas.

"Q. Now, directing your attention, if I may please, to the next column; what is that?

"A. That is fever; and he had no fever.

"Q. And what is the entry?

"A. 'None.'

"Q. Now, directing your attention to the next column in your medical log book, what is that column?

"A. That is, treatment.

"Q. What have you got noted under the column, treatment?

"A. 'Treated with Unguentine and bandaged.'

"Q. And the next column, what is that?

"A. 'Examined by a doctor at Beaumont, Texas.' First he was treated by me and then he was examined about a day later in Beaumont.

"Q. Now, coming to the next column which is headed Disposition; tell me what entry you have under that col-
[fol. 216] umn?

"A. 'Paid off at Beaumont, Texas, June 4, 1935.' And he left the ship.

"Q. After reading these entries, do you now recall seeing Herbert A. Smith, Jr., on June 2nd, 1935?

"A. Yes, I recall that he came up here and I treated him and he went down again.

"Q. You mean at your room aboard the 'Yankee Arrow'?

"A. Yes, in my quarters aboard the 'Yankee Arrow.'

"Q. And had you seen him prior to that time; I mean, did you ever have any conversation with him prior to that time?

"A. I might have seen him but with so many men you don't know every one of them.

"Q. Did you witness any accident to Herbert Smith?

"A. No, I did not.

"Q. What information you acquired regarding any accident to him was from statements?

"A. From statements made by himself.

"Q. To you?

"A. To me; and consequently I treated that bruised knuckle or scratch on the finger. This statement (indicating) is his statement.

"Q. And the treatment which you gave him, you gave him on June?

"A. June 2nd.

"Q. June 2nd, 1935?

"A. Yes.

"Q. Did you on this voyage give him any other treatment?

"A. No, no other treatment.

"Q. Did he ask you at that time or any other time for any other treatment?

"A. No, no other treatment.

"Q. Did you at any time ascertain from any one or from any source that he needed or required any other treatment?

"A. If I asked anybody?

[fol. 217] "Q. Did anybody tell you?

"A. No; nobody told me.

"Q. Now then, this was the only treatment?

"A. That is the only treatment I gave him.

"Q. Now, on this occasion of June 2nd, 1935, did he tell you that he had received any other or different injuries than those specified in your medical log?

"A. No; that is all he specified here and he seen the statements in the rough log and this (indicating) is a copy of it—the smooth log.

"Q. When did you say you arrived at Beaumont?

"A. At Beaumont at 12:16 P. M., June 4th.

"Q. On arrival at Beaumont, did Herbert Smith——

"A. He asked for to be paid off.

"Q. And was he paid off?

"A. Yes, I granted that.

"Q. And he left the ship?

"A. Yes, he left the ship. You see they are not supposed to be paid off; they are supposed to live up to their agreement in the articles for a round trip.

"Q. And where was this voyage on which he signed on?

"A. At Baltimore.

"Q. And that was on a voyage to Beaumont?

"A. To Beaumont, Texas and back to Quincy, Massachusetts.

"Q. As a matter of fact, when did the S. S. 'Yankee Arrow' sail from Beaumont, Texas?

"A. That would be the next day, the 5th: in other words, he didn't complete the voyage. We sailed the 5th. We sailed from Beaumont, 1:09 P. M., June 5th, 1935; we left Beaumont for Quincy and we arrived at Quincy on June 14th.

"Q. At what time?

"A. I have it right here (indicating). Let me see—we [fol. 218] arrived at Boston Harbor anchorage and then we were waiting twenty-four hours for tides.

"Q. And what time did you arrive at Quincy?

"A. We arrived at Quincy the next day again (indicating); here, secured to wharf 10.25 A. M., the 14th of June.

"Q. Of June, 1935?

"A. 1935.

"Q. So that, refreshing your recollection from your log?

"A. Yes.

"Q. Tell us when, if you please, the voyage which commenced at Baltimore on May 28th, 1935, terminated?

"A. We terminated at Quincy, Mass.

"Q. On what date?

"A. June 14th, 1935, 10:25 A. M.

"Q. Did you subsequently make a report to the defendant company regarding the accident?

"A. Yes, on the same day. There is a copy of that (indicating) on the 'Yankee Arrow' and one sent to the office. I make them in duplicate; and this (indicating) is a copy of the one I sent to the New York office.

"(Stenographer marks report, Defendant's Exhibit D for identification, 4/1/37, A. R. Kirwin)."

The original has already been received in evidence, your Honor, so I don't offer it at this time. (Continuing reading):

"Q. Now, Captain Ibsen, with reference to this report which has been marked 'Deft's D. for Ident.' I direct your attention to certain names in typewriting?

"A. Yes.

"Q. First, this name here (indicating)?

"A. Signed.

[fols. 219-246] "Q. And what appears there?

"A. 'S. C. Ibsen.'

"Q. Was that your signature?

"A. Yes.

"Q. And did you sign an original, of which this is a copy?

"A. Yes.

"Q. And did anyone else sign that report?

"A. Yes, Herbert A. Smith, Jr.

"Q. And is his name signed to the original report?

"A. Yes.

"Q. And who else signed the report?

"A. R. L. Turner, first assistant engineer.

"Q. When you saw Mr. Smith on June 2nd, 1935, and had this conversation concerning which you have testified, did you have any other conversation with him other than the conversation at the time he was paid off?

"A. No.

"Q. At that time did he make any complaint of any injuries other than those which appear in your medical log?

"A. No, he didn't; because otherwise we would have entered them."

Now, in addition to the admissibility of the report and the log, I urge that from the deposition now read, from the evidence of admission made by plaintiff. I did not argue that at the time because the deposition was not read in but it is now academic, the papers having been received in evidence.

Your Honor, may I call my doctor out of order who has just arrived?

The Court: Certainly.

. . . . . .

[fol. 247] Afternoon Session, 2:15 P. M.

Mr. Potter: May it please your Honor, with your Honor's permission I will read in the deposition of Captain Amm, who was the chief mate on the voyage in question, and I will hand you a copy of the deposition. (Reading):

"Direct examination:

By Mr. Potter:

"Q. What is your occupation, sir?

"A. Master mariner.

"Q. And are you attached to any vessel at the present time?

"A. Yes, on the S.S. 'Ario.'

"Q. And in what capacity are you serving on that vessel?

"A. As master.

"Q. And when did you arrive at the Port of New York?

"A. Yesterday evening at 5:30.

"Q. That would be March 31, 1937?

"A. Yes.

"Q. And when does the 'Ario' expect to sail?

"A. Shortly after midnight.

"Q. Of today?

"A. Of today—tonight.

"Q. Tonight?

"A. Yes.

"Q. Do you expect to sail with her?

"A. I expect to sail with her, yes, before sun-up.

"Q. What is that?

"A. Before sun-up.

"Q. How long have you been going to sea, Captain?

"A. A matter of 36 years.

"Q. Do you hold a master's certificate?

"A. Yes, sir.

"Q. When did you obtain your master's certificate?

"A. At New York in February, 1931.

"Q. When did you first start going to sea?

"A. In 1901.

"Q. And in what capacity?

"A. As an apprentice seaman.

"Q. And then did you serve through the various grades, [fol. 248] until you received a master's certificate?

"A. Yes.

"Q. And in what kind of vessels did you sail?

"A. I started out in sailing vessels, until 1910, and in 1910 I went into steam, in freighters, passenger boats, and now I am sailing in tankers, for the last 15 or 17 years.

"Q. Do you know the steamship Yankee Arrow?

"A. I do.

"Q. Were you ever attached to that vessel?

"A. I was chief officer on board that vessel.

"Q. Do you recall approximately when it was that you joined her?

"A. During September, 1934.

"Q. And in what capacity?

"A. Chief officer.

"Q. Tell us briefly what kind of vessel the Yankee Arrow is?

"A. The S.S. Yankee Arrow is a tank vessel, carrying different grades of oil—refined oil in bulk. It is a flush-deck vessel."

Mr. Potter: Your Honor, I have here in court a model of the S.S. Yankee Arrow. It is a scale model prepared for the defendant in cases involving litigation concerning the Arrow type of vessels. I can get the formal proof by the model maker if it is so desired. I will state as a member of the bar that this is a scale model prepared from plans at my suggestion by a competent model maker.

The Court: Why don't you read the deposition and when you want to introduce it as a model to assist the jury you may do so.

Mr. Potter: All right, sir.

The Court: I think that is the better way.

Mr. Potter (continuing reading):

[fol. 249] "Q. Where are the boilers and engines located? Aft?

"A. Yes, aft.

"Q. And where is the master's—where is the bridge and the master's quarters?

"A. The master's quarters are about two-thirds from the bow.

"Q. Were you aboard the steamship Yankee Arrow on a voyage which commenced in Baltimore, Maryland, on or about May 28, 1935?

"A. I was.

"Q. And did you make that voyage on the steamship Yankee Arrow commencing about May 28, 1935?

"A. I did.

"Q. And where was the vessel bound for on that voyage?

"A. For Beaumont, Texas.

"Q. The steamship Yankee Arrow is a tanker?

"A. Yes.

"Q. On this voyage, which commenced on May 28, 1936, did you carry any cargo or were you in ballast?

"A. We was in ballast.

"Q. Did you carry any passengers?

"A. No, sir.

"Q. I show you now two books, one of which has been marked Defendant's Exhibit A for identification, of April 1, 1937, and the other of which has been marked Defendant's Exhibit B for identification, of April 1, 1937, and ask you if you know what those two books are (handing)?

"A. That is the log book—the rough log.

"Q. And which one of those books there is the rough log? The one that is marked Defendant's Exhibit A for identification or the one that is marked Defendant's Exhibit B for identification?

"A. 'A.'

"Q. Defendant's Exhibit A for identification is the rough log?

"A. Yes, that is the rough log, right here (indicating).

[fol. 250] "Q. And what is the book which has been marked Defendant's Exhibit B for identification?

A. That is the engineers' log book.

"Q. That is what?

"A. The engineers' log book.

"Q. It is the smooth log, is it not?

"A. Yes, that is right. That is the smooth log.

"Q. Now, if you will, please look at those two log books which have been marked respectively Defendant's Exhibits A and B for identification, and tell me whether those books contain the entries referring to the voyage which commenced at Baltimore, Maryland, on May 28, 1935, towards Beaumont, Texas?

"A. Yes, the first page, May 28, 1935 (indicating).

"Mr. Engleman: The first page of which book?

"Q. Defendant's Exhibit A for identification?

"A. Yes, 'A'.

"Q. That is the rough log?

"A. Yes, that is the rough log.

"Q. Directing your attention now to that voyage, who were your deck officers? Who was the master?

"A. The master was Captain Ibsen.

"Q. And who was the chief mate?

"A. It was myself.

"Q. Go ahead. Who was the second officer?
"A. The second officer was S. Hill.
"Q. And who was your third mate?
"A. The third mate was R. Little.
"Q. And on that voyage did you stand a watch?
"A. Yes, sir, I did.
"Q. And which watch were you assigned to?
"A. 4 to 8.
[fol. 251] "Q. On this tanker did you carry a doctor?
"A. No, sir.
"Q. Are doctors usually carried on cargo vessels?
"A. No, sir.
"Q. Are they usually carried on tankers?
"A. No, sir.
"Q. In the event that a member of the crew sustains an injury while the ship is at sea, who renders first aid?
"A. The master.
"Q. And who has charge of the medicine chest?
"A. The master.
"Q. And who treats an injured person?
"A. The master.
"Q. In the event that some member of the engine room department is injured, where are the entries concerning the accident entered? In the engine room log or in the deck log?
"A. In the engine room log.
"Q. Do the deck officers have anything to do with the keeping of either the rough engine room log or the smooth engine room log?
"A. Nothing whatever.
"Q. Now, directing your attention to the entries which appear in those two deck logs which you have before you, when did the Yankee Arrow arrive at Beaumont, Texas?
"A. June 4.
"Q. And did you load cargo at Beaumont?
"A. Yes, sir.
"Q. And when did you sail from Beaumont?
"A. June 5.
"Q. Bound for what port?
"A. Bound for Quincy, Massachusetts.
"Q. And what time or when did you arrive at Quincy, Mass.?
"A. We arrived at Quincy, Mass., June 14.

"Q. And tell us, if you will, please, the date on which the [fol. 252] voyage which commenced on May 28, 1935, at Baltimore, Maryland, to Beaumont, Texas, and from Beaumont, to Quincy, Mass., terminated and ended?

"A. She started on May 28 from Baltimore——

"Q. Yes, bound for what port?

"A. Bound for Beaumont, and arrived at Beaumont June 4; sailed June 5 for Quincy, Mass., and arrived at anchorage 3:30 a. m. on the 13th.

"Q. On what?

"A. On the 13th we were anchored.

"Q. That is, in Boston harbor?

"A. Yes.

"Q. And when did you go to Quincy?

"A. And we went to Quincy on the 14th; arrived at Quincy June 14th, at 10:25 a. m.

"Q. And there that voyage terminated?

"A. That is where the voyage terminates.

"Q. Now, directing your attention, if I may, please, to the rough log which you have before you now, and the voyage commencing on May 28, 1935, and terminating at Quincy, Massachusetts, on June 14, 1935——

"A. Yes.

"Q. (Continuing.) Are the pages of the log book for that voyage signed by you as chief officer?

"A. Yes, sir.

"Q. I direct your attention to the name 'Amm' at the foot of each one of the pages containing the dates and entries of that voyage, and ask you if the signature 'Amm' is your signature?

"A. That is my signature on every page.

"Q. And that applies to the rough log?

"A. To the rough log, yes.

"Q. Now, if you will, please, look at the smooth log, which is marked Defendant's Exhibit B for identification, and tell me in whose handwriting the entries in that log are? [fol. 253] "A. I signed every page on the bottom.

"Q. And are the signatures 'Amm' at the foot of the pages in that log for this particular voyage concerning which you have been testifying, your signatures?

"A. That is my signature.

"Q. Who made the entries in the rough log for the events and occurrences during your watch?

"A. I did.

"Q. And are these entries for the four to eight watch in your handwriting?

"A. Yes, sir.

"Q. And do those entries correctly set forth the events which occurred during your watch?

"A. They did.

"Q. On this voyage from Baltimore, Maryland, commencing on May 28, 1935, what sort of weather did you experience?

"A. The log book will show.

"Q. Well, look through it, and see whether you, at any time, experienced any bad weather?

"A. No, sir.

"Q. The highest force on the Beaufort scale is force 3, is it not, entered in the rough log there?

"A. Yes, force 3.

"Q. On the Beaufort scale?

"A. Yes—no; there is one that is 4, south by west. On one watch there was a little more wind, but not much of a wind—just wavelets and smooth sea.

"Q. That force 4 is on the Beaufort scale?

"A. Yes.

"Q. And that is a wind velocity of how many miles on the Beaufort scale?

"A. 9 to 10 miles.

"Q. And for this voyage would you consider that a severe wind or very high wind?

"A. No; a very light breeze—very light.

[fol. 254] "Q. So that on this voyage you did not experience any high seas?

"A. No, sir.

"Q. Or high winds?

"A. No, sir.

"Q. Did you witness this accident which Herbert A. Smith, Jr., says he met with?

"A. No, sir.

"Q. Do you recall at this time ever having seen a man in the engine room department named Herbert A. Smith, Jr.?

"A. I remember there was a man on board by that name.

"Q. Did you ever have any conversation with him?

"A. No, sir, not to my knowledge.

"Q. Did he ever tell you that he required any medical treatment of any kind?

"A. No, sir.

"Q. Did he ever make any complaint to you that he was in need of medical treatment, which had been refused him?

"A. No, sir.

"Q. Did you hear anyone on this voyage, commencing on May 28, 1935, say that a man named Herbert A. Smith, Jr., required medical treatment?

"A. No, sir.

"Mr. Potter: You may inquire."

Mr. Engelman (Reading):

"Cross-examination.

"By Mr. Engelman:

"Q. Will you let me see those books, Captain? A. Yes (handing book to Mr. Engelman).

"Mr. Potter: May we have it appear that at the request of counsel for the plaintiff, the rough log and the smooth log, marked respectively Defendant's Exhibit A for identification and Defendant's Exhibit B for identification, were thereupon given to counsel for the plaintiff, and that he examined them. There is one other, if you desire to look at it (handing book to Mr. Engelman)."

[fol. 255] Mr. Potter: May I interrupt at this point? I desire to call attention that at that time the books were examined by counsel for the plaintiff in this action.

The Court: That is self-evident. What is the good of repeating it.

. . . . . .

"Q. Captain, tell me what do you keep in your rough log? What does that cover?

"A. Everything what happens during the voyage.

"Q. Well, what is your distinction between the rough log and the smooth log?

"A. The rough log is a pencil copy.

"Q. In other words, the only difference is that the notes made in the rough log originally are in pencil, and then are transcribed into the smooth log?

"A. That is right.

"Q. And does the smooth log contain anything that the rough log does not contain?

"A. No, it is exactly the same.

"Q. The same thing?

"A. Yes, the same thing.

"Q. And both of these log books, Defendant's Exhibits A and B for identification, they do not cover any of the work or any of the occurrences in the engine department, do they?

"A. No.

"Q. If a man is taken sick or injured aboard the vessel, and that is reported, would that be entered in either the rough or the smooth log?

"A. If it is a very serious case.

"Q. Only if it is a very serious case?

"A. Yes; not a slight case of a scratch.

"Q. Do you mean by 'a very serious case' a case where a man has been so badly hurt that he has to be put to bed?

"A. Yes.

"Q. That is about the test that you use?

"A. Yes; we don't enter when a fellow cuts his hand, [fol. 256] or skins his shinbone, or such as that. We don't enter that in the log.

"Q. In other words, you simply enter those things in the log where you yourself can see with your own eyes that it is a serious injury?

"A. Well, yes.

"Q. Now, this vessel, the Yankee Arrow, at that time carried a medicine chest, did it not?

"A. Oh, yes.

"Q. And would you just tell us what it contained—that medicine chest—if you know, of your own knowledge?

A. Well, the medicine chest contains everything what you need for first aid treatment, and specially it is specified by the Board of Health of the United States what it has to contain.

"Q. Now, Captain, is it not the usual practice on steamships for the chief steward to have charge of the medical chest and to administer first aid?

"A. No, sir.

"Q. That is not the usual practice?

"A. No, it might be if the master detailed a man to help him, yes. The logical man is the steward, to help him;

but the steward had nothing to do with the medicine chest. In fact, the master keeps the key. As chief officer, I had to ask the master, if I wanted a piece of bandage. The master is in charge of the medicine chest.

"Q. In other words, as I understand you, the chief steward has no right to administer any medical aid until he gets the consent of the master?

"A. That is right.

"Q. And that is the general rule and practice on ships of this defendant?

"A. Yes.

"Q. Now, how long have you been sailing with this defendant, Socony-Vacuum Oil Company?

"A. Since the [illegible] of July, 1924.

[fol. 257] "Q. And you have been sailing continuously since that time, have you?

"A. Yes, outside of my vacation.

"Q. Yes, and you first sailed as a master for this defendant on what date, approximately?

"A. Approximately the 1st of September of last year.

"Q. And had you ever sailed as a master of any vessel prior to September of 1936?

"A. No, sir.

"Q. But you did have a master's license before that time, did you?

"A. For five years.

"Q. Now, your watch, as chief officer, during this voyage on the Yankee Arrow beginning at Baltimore, Maryland, in May, 1935, was the four to eight watch?

"A. Yes.

"Q. So that you were on watch eight hours a day?

"A. Yes, four in the morning and four in the afternoon."

Mr. Engelman: There may be a part of this, your Honor, that I don't think it is important to read. It is simply matter that has already been covered.

Mr. Potter: I will read, beginning on page 14:

"Q. Now, did you sign articles before the Shipping Commissioner?

"A. No, sir.

"Q. You did not sign what are called coastwise articles?

"A. Yes.

"Q. You did?

"A. We signed coastwise articles, and the master acts as the shipping commissioner.

"Q. And they were signed at Baltimore?

"A. Yes.

"Q. And that was for a voyage beginning at Baltimore on or about May 28, 1935, and the voyage ended at Quincy, [fol. 258] Massachusetts, about June 14, of the same year?

"A. Yes, that is right.

"Q. And at Quincy the crew was paid off before the master or before the shipping commissioner?

"A. No, before the master. The master pays them off."

Skip to page 16:

"Redirect examination.

"By Mr. Potter:

"Q. You testified in response to some questions propounded by counsel for the plaintiff, that serious injuries are entered in the deck log?

"A. Yes.

"Q. Or entered in some log?

"A. In some log, yes.

"Q. Now, do you find any entries in the deck logs for this voyage commencing on May 28, 1935, concerning any injuries to an oiler named Herbert A. Smith?

"A. No, sir, I find nothing in the log about that.

"Q. That is, either of the deck logs?

"A. Yes.

"Q. Now, when you were referring to these injuries, you were referring to any injury which might be sustained by a member of the crew in the deck department?

"A. Yes.

"Q. As distinguished from the engine room department?

"A. Yes.

"Q. Is that correct, sir?

"A. That is correct, yes.

"Q. You have nothing to do with the entries which are made in the engine room logs?

"A. No, sir.

"Q. Either in the smooth log or the rough log?

"A. No, sir."

[fol. 259] June 10, 1937.

SWEN LAWSON, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Potter:

Q. Chief, will you speak up loudly, please.

A. Yes, sir.

Q. Chief Lawson, what is your occupation at the present time?

A. Chief engineer.

Q. Are you attached to any vessel at the present time?

A. Yes—well, not at the present time; I am on my vacation, so to speak.

Q. What was the last vessel that you were attached to?

A. The Yankee Arrow.

Q. You have been in port awaiting the trial of this action?

A. Yes.

Q. How long have you been going to sea?

A. 36 years.

Q. Do you hold any certificates?

A. Yes, sir, I hold a chief engineer's certificate on ocean steamers, any gross ton.

Q. For how long a period of time have you held such a certificate?

A. 13 years.

Q. Prior to receiving this certificate, what if any experience have you had in ships and tankers?

A. Well, before, I was assistant engineer, before that time I was fireman, oiler, water tender, third engineer, second engineer, first engineer and finally chief engineer.

Q. Do you recall a voyage on the S.S. Yankee Arrow commencing at Baltimore in May of 1935?

A. I do.

Q. Were you attached to the S.S. Yankee Arrow on that voyage?

A. Yes, sir, I was.

[fol. 260] Q. In what capacity?

A. As chief engineer.

Q. Did you continue with the ship from Baltimore until she arrived at some southern port?

A. Yes, sir, we went to Beaumont.

Q. And during all of that voyage, were you acting as chief engineer?

A. Yes, sir.

Q. I show you two books and ask you if you know what those books are.

The Court: "Those books" means nothing in the record. Identify them by their numbers. Have they any numbers?

Mr. Potter: I think this is the first time the engineer's book was referred to.

The Court: This has no number?

Mr. Potter: No, the others were the deck logs.

A. This is the engineer's, a smooth log and a rough log.

Q. Tell us if you will which is the rough log.

A. The rough log is the one which is written down in lead pencil; the smooth one——

Q. Wait a minute before you speak of the smooth log. Hold up, if you will, the rough log.

A. This one.

Q. Was that log, which you point to, kept under your supervision on the voyage of the S.S. Yankee Arrow commencing at Baltimore on May 28th, 1935?

A. Yes, sir.

. . . . . .

[fol. 261] By the Court:

Q. Are all the entries in the rough log in lead pencil?

A. In the rough log they are in lead pencil.

Q. In whose handwriting are they?

A. In three handwritings. The first engineer, the second engineer and the third engineer.

Q. On each voyage are there three engineers?

A. Yes, sir.

. . . . . .

[fol. 262] By Mr. Potter:

Q. What is the other book which you have in your hand?

A. This is the smooth log.

Q. Does that book contain entries concerning the voyage of the S.S. Yankee Arrow commencing at Baltimore on May 28, 1935?

A. Yes, it does.

Q. Are any portions of the entries in that book in your handwriting?

A. All of it is in my handwriting.

By the Court:

C. Everything in the book is in your handwriting?

A. Yes.

[fol. 263] By Mr. Potter:

Q. I direct your attention to the entries made for the date June 2nd, 1935—turn, if you will please, to that page; are there any signatures at the foot of that page?

A. Yes, sir.

Q. Are either of those signatures your signature?

A. Yes, this is my signature.

Q. Where does your signature appear, on the righthand corner or lefthand corner?

A. On the righthand corner.

Q. Are there any other signatures on there?

A. No, sir.

Q. Directing your attention to the entries for that date, in whose handwriting are those entries?

A. This is my handwriting.

Q. And when did you make those entries?

A. On June 3rd, as we enter the log on the following day, when the 24 hours is up, at 12 o'clock noon the next day of June 3rd.

Q. What was your practice aboard the S.S. Yankee Arrow on this voyage regarding the entries which were made in the smooth log which you now have before you?

A. I don't understand you, Mr. Potter.

Q. At the time you made the entries in the smooth log which you now have before you, did you have before you any other book or document?

A. Yes, sir, the rough log.

Q. And did you make any use of the rough log in making the entries into the smooth log which you now have before you?

A. Yes.

Q. Tell us, if you will, what your practice was in that regard.

A. My practice was to see the rough log and enter what is [fol. 264] in the rough log, first, and if I found out anything

contrary in the rough log what I think in my opinion is right, I write it down.

Q. And is the smooth log which you now have before you the record kept by you of the voyage of the S.S. Yankee Arrow commencing on May 28th, 1935?

A. Yes, sir.

* * * * * * * * *

[fol. 265] Mr. Potter: May I see Plaintiff's Exhibit No. 1, being the photograph of the S.S. Yankee Arrow?

(Photograph handed to counsel.)

Q. On June 2nd, 1935, were you in the engine room of the S.S. Yankee Arrow?

A. Yes, sir.

Q. Directing your attention particularly to that date, can you tell us approximately when you first went into the engine room, just approximately.

A. Approximately about six o'clock in the evening.

Q. In the forenoon?

A. In the afternoon.

Q. In the afternoon; when did you join the S.S. Yankee Arrow just prior to this voyage of May 28th, 1935?

A. I joined the Yankee Arrow February 8th, 1934.

Q. And did you continue with her down to June, 1935?

A. Yes, sir.

Q. During this period, from the time you first joined it, down to June, 1935, were you familiar with the conditions which existed in the engine room?

A. I was.

[fol. 266] Q. Were you familiar with the machinery?

A. I was.

Q. In the engine room of the S.S. Yankee Arrow?

A. Yes, sir.

Q. I show you a photograph which has been marked Exhibit No. 1 and ask you if that photograph is a fair representation of the conditions which existed on June 2, 1935?

A. Yes, it is.

Q. I direct your attention to a step plate which appears in that photograph, which has been marked with the figure 1; will you look at the photograph, please?

A. Yes, sir.

Q. Was that step plate as shown in that photograph there on June 2nd, 1935?

A. Yes, sir.

Q. Was there any bracket beneath it?

Mr. Engelman: I object to that as leading—"was there any bracket beneath it."

The Court: That calls for a yes or no answer.

By the Court.

Q. By what was that step plate supported?

By Mr. Potter:

Q. The question was how was that step supported?

A. The step was supported by two 5/8ths inch bolts, this step, this is of 3/8ths inch checker plate and it is held down by two 5/8ths bolts.

By the Court:

Q. What is the step bolted to?

A. It is bolted to the engine frame, the crank frame.

[fol. 267] Q. By two bolts?

A. By two 5/8ths bolts.

Q. Is there anything else that holds the step in position but the bolts?

A. The bolts is the only thing.

Q. The bolts are the only thing, no other supports?

A. No other supports.

Q. What is under the step?

A. This is simply a plate made to fit the crank frame and screwed down by those two 5/8ths bolts.

Q. Is that shown in the picture?

A. That is shown in the picture. There is one plate, and there is the other (indicating).

Q. What else do you see there is on that; when you look under the step, what do you see?

A. There is nothing under the step, except the crank frame.

Q. What is that?

A. The frame that the crankshaft rests on. There is a solid piece of iron.

Q. Did you ever see anything underneath that?

A. Underneath what?

Q. Underneath the step.
A. Nothing underneath the step.
Q. Did you ever see a bracket underneath the step?
A. No, sir; there is no such thing.
Q. There is no bracket underneath?
A. There is no such thing as a bracket underneath that step.
Q. You say that the only thing that holds the step in position are the two bolts?
A Two bolts.

By Mr. Potter:

Q. Directing your attention to June 2nd, 1935, what was the condition of those bolts making fast this step plate?
A. The condition was A1, it was in perfect condition.
[fol. 268] Q. Were they loose?
A. No, sir.
Q. Was the step plate out of place?
A. No, sir.

By the Court:

Q. When you say it was in perfect condition and it was not loose, what do you know about it?
A. Because at six o'clock, I went down and I personally examined the plate and also the bolts to see that everything was all right, and there was nothing loose or out of order.

By Mr. Potter:

Q. Now, I direct your attention to photograph which has been marked Plaintiff's Exhibit No. 2, and ask you if that photograph also shows the same step plate as the one you have just testified about?
A. Yes, sir.
Q. And that is the photograph of the same step plate?
A. The same thing. It is the very same step plate.

The Court: Let me see it.

(Photograph handed to the Court.)

Q. Directing your attention now to your engine room crew on this voyage, did you have in your department a man named Herbert Smith?
A. Yes, sir.

Q. Did you ever see him prior to June 2nd, 1935?
A. Yes.
Q. In what capacity was he serving on this voyage?
A. As an oiler.
Q. Did you see him a day or two prior to June 2nd, 1935?
A. Yes.
[fol. 269] Q. Where did you see him?
A. Outside the mess room.
Q. What was he doing there?
A. He was engaged in a fist-fight.
Q. Engaged in a fist-fight? Who was he fighting with?
A. To my best recollection, it was with another oiler on the 12 to 4 watch.
Q. What time of day was this?
A. In the afternoon.
Q. How long did the fight last?

By the Court:

Q. On what date was that?
A. June 1st.

Mr. Potter: I will withdraw that question, "How long did the fight last."

By Mr. Potter:

Q. What did you do when you observed this?
A. I stopped them; separated them and told them to go about their business.

By the Court:

Q. Where did the fight take place?
A. Outside of the crew's mess room.
Q. When you say you saw the fight, just tell the jury what you saw them do.
A. They were swinging their fists.
Q. They were doing what?
A. They were poking their fists at each other.
Q. They were doing what?
A. They were trading blows.
Q. Did you see their hands?
A. Yes, sir, I did.
Q. How were their hands placed?
A. In the mid-section.
Q. Did they hold them open, or did they have fists?

A. Yes, they had fists.

[fol. 270] Q. How many fists did you see?

A. I saw three or four blows.

Q. How many fists did you see?

A. I saw four.

Q. How many blows did you see?

A. I should say about a half-dozen.

Q. Who did you see giving the blows?

A. I guess they were trying to give blows to each other as much as possible.

Q. Did you see both giving blows?

A. Yes.

Q. Who received the blows?

A. Both of them.

Q. That is what you mean when you say you saw them fighting?

A. Yes.

Mr. Potter: Your Honor, subject to——

The Court: Let him finish.

Q. How long did they do that?

A. Oh, just about a minute or so.

Q. What happened then?

A. I told them to stop fighting immediately and go about their business.

Q. Did they mind you?

A. Yes, they did.

Q. And when you said "stop"?

A. They stopped.

Q. And went about their business?

A. Yes.

Q. Did you see one hold the other?

A. No, there was no holding at all; they were just swinging their fists.

Q. Did you see them hold one against the other?

A. No, I did not see that.

By Mr. Potter:

Q. Just where did you say this took place?

A. On June 1st.

Q. Where?

A. Outside the mess room, the mess hall.

[fol. 271] By the Court:

Q. That was not in the engine room?
A. No.

By Mr. Potter:

Q. Where is the mess hall located?
A. On the after part of the ship.

The Court: You brought a model here. Here is a man who can tell you all about it, whether that model is an exact model——

Mr. Potter: Mr. Engelman, do you wish me to prove that this is a scale model? I will tell you that it is a scale model prepared from plans. I will call the model maker. He is not present here now but I can get him. He frequently testifies for me and if you raise the question, I can prove it by him, otherwise I will proceed with this witness.

Mr. Engelman: That is satisfactory to me.

By the Court:

Q. Is that exactly like the ship?
A. That is exactly like the ship.
Q. Is there any difference between that model and the appearance of the Yankee Arrow?
A. No, it is exactly the same.
Q. You see no difference?
A. No difference.

Mr. Potter: May I move the model a little forward on the rail, your Honor?

The Court: Yes, certainly.

[fol. 272] By Mr. Potter:

Q. Will you tell us briefly where the boilers and engines are located on this model?

The Court: Why don't you offer it in evidence?

Mr. Potter: Pardon me, sir, I offer the model in evidence.

Mr. Engelman: No objection.

The Court: There is no objection. It is admitted for the purpose of assisting in the witness's testimony.

(Marked Defendant's Exhibit I.)

Q. Now, Chief, directing your attention, if I may, please, to the model which has been marked Defendant's Exhibit I, will you tell us where the master's quarters are located?

A. The master's quarters are located in what we call midships.

Mr. Potter: May the witness step down and point to it, your Honor?

The Court: Yes.

The Witness: Here is the master's quarters located here.

Q. In the house?

A. Midships, on the starboard side right here.

Q. Where is the master's navigation bridge?

A. Right here (indicating).

Q. How many decks has the S. S. Yankee Arrow?

A. Two decks.

Q. By what name do you designate the decks exposed to the weather and shown on that model?

[fol. 273] A. It is on the model here, and that is what is called the shelter deck.

Q. That is the upper deck exposed to the weather?

A. Yes, sir.

Q. Is there a deck below that which is shown in the position that the model is in now?

A. Yes.

Q. What do you call that deck?

A. The main deck.

Q. On this Yankee Arrow, where were the boiler and engine rooms?

A. There is the place of the boiler room. These two ventilators go right down the fire room or boiler room, that is what we call the boiler room.

Q. What are these two objects here?

A. This is the skylight in the engine room.

Q. The engine room extended downward?

A. From here to approximately here is the engine room space going down.

Q. How do you designate this deck which is just aft of the stack?

A. This is the lifeboat deck.

Q. What is located directly below the boat deck?

A. The engineers' quarters. That is my room here on the right side; the first engineer on the right side; then we have the second engineer, the third engineer and the machinists' quarters. My quarters are located on the starboard side and the mess room which is now not in use, is used at the present day as a storeroom, located on the starboard side.

Q. On this voyage in question which commenced at Baltimore on or about May 28th, 1935, where was the engine room mess?

A. The engine room crew's mess?

[fol. 274] Q. Where was the crew's mess of the engine room?

A. Down below the poopdeck.

Q. That you cannot see on this model. Referring to this fight or altercation which you say you witnessed, tell us if you will please, where that fight took place.

A. Right here (indicating).

Q. Referring to this fight or altercation which you say you witnessed, tell us where it took place.

By the Court:

Q. Where did you see those blows struck?

A. Right below here; the mess room is located below this deck right here; outside the mess room below the deck.

Q. Below the poopdeck?

A. Below the poopdeck.

Mr. Potter: I guess you can take the stand again if you will, Chief.

You may inquire.

Cross-examination.

By Mr. Engelman:

Q. How long have you been working for this defendant, sir?

A. Since October, 1921.

Q. And you have been almost continuously employed since that time?

A. I have.

Q. You did not start in as chief engineer, did you?

A. I did not.

Q. What was your first job?

A. I believe my first job was third engineer.

Q. And as chief engineer, what are your wages?

A. Well, they have been changed lately. The chief engineer's wages up to a few weeks ago was $250 to $260.

[fol. 275] Q. What are they now?

A. After five years they are increased to $320.

Q. That is a month?

A. A month.

Q. In addition to that, you get your quarters on the ship?

A. I do, yes.

Q. As chief engineer, you do not stand watches, do you?

A. No, sir.

Q. Your job is of a supervisory nature, is it not?

A. Yes, sir.

Q. You have testified that on June 2nd of 1935 you went down and looked at this step?

A. Yes, sir.

Q. What caused you to go down there?

A. The cause of it was because I heard somebody got hurt down below.

Q. That was the first time that you had looked at that place for some time?

A. No. I always look over the different parts in the engine room every day, Sunday included.

Q. I call your attention to the photograph marked Plaintiff's Exhibit No. 2, and I direct your attention to this object which appears to me to be an angle iron, is that correct?

A. It is a piece of an angle iron.

Q. All right, will you put the letter Z there, if you please, nearby; will you put the Z beneath there, not on top of it but beneath it?

A. (Witness marks.)

The Court: Let me see that, will you please?

(Photograph handed to the Court.)

Q. With respect to that angle iron designated Z, will you kindly look at that, sir; do you notice in that angle iron a [fol. 276] certain empty hole? Do you notice that there? I refer to this part beneath the step plate. You see a hole there, don't you?

A. Well, I could not say it is a hole.

The Court: In the angle iron?

Mr. Engelman: Yes, in the angle iron.

Q. You see, Chief, do you not, what I refer to in that photograph?

A. Yes.

Q. Can you tell me what that is, please?

A. That is a piece of an angle iron, it squares this guard plate for the crank. You see that up there, it squares the guard plate for the crank.

Q. I understand, sir, but I see that in the angle iron above the plate there appear to be two bolts, whereas in the angle iron below the plate there is one bolt which squares it to that portion which you call the guard crank, but on the end part of the angle iron there appears to be a groove or opening. I just direct your attention to that and ask you what it is.

The Court: Is there an opening there?

The Witness: That may be a flat head screw. That is what it appears to be.

Q. It might be a flat head screw?

A. Yes.

The Court: Do you want the jury to hear what you are talking about?

Mr. Engelman: Yes, I do.

Mr. Potter: Now I object to any communication between counsel and the jury.

Mr. Engelman: I was just pointing this out on the photograph.

Mr. Potter: That is what I object to.

[fol. 277] The Court: Suppose you take a look at that; do you know what he is referring to?

Mr. Potter: Your Honor, what I objected to was any communication on the part of counsel for the plaintiff with the jury at this time.

The Court: No, he was there looking at it.

Mr. Potter: He was speaking to the jury and that is what I objected to.

The Court: I did not hear that.

Mr. Engelman: I was merely asked a question, your Honor.

Mr. Potter: That is what I objected to.

The Foreman: I asked a question, your Honor. I asked him to point out the angle iron to me, that is all.

The Court: It is marked Z very plainly.

The Foreman: I see it now.

Q. You joined the Yankee Arrow at what date, sir?

A. I joined the Yankee Arrow on the 7th or 8th of February, 1934.

Q. That step plate was there at that time, was it?

A. It was.

Q. And there was no bracket there?

A. No, sir.

Q. And it continued there without any bracket?
A. Yes, sir.

The Court: We better adjourn now until tomorrow at 10:30.

(Adjourned to June 11th, 1937, 10:30 a. m.).

[fol. 278] New York, June 11th, 1937,
10:30 o'clock a. m.

(Trial Resumed)

SWEN LAWSON, resumed the stand:

Cross-examination continued.

By Mr. Engelman:

Q. Now, Mr. Lawson, the smooth log, that is the smooth engine room log which has been marked Defendant's Ex-
[fol. 279] hibit H for identification, that is in your own handwriting, is it not?
A. Yes, sir.
Q. And as I understand, you make that by copying the entries from the rough log?
A. Yes, sir.
Q. Into the smooth log?
A. Yes, sir.
Q. You do not make the entries in the rough log, do you?
A. No, sir.
Q. I believe you testified that in addition to the entries that you copied from the rough log, it also contains certain other information which you heard and entered therein, is that right?
A. That is correct.
Q. So that the entries in this smooth engine room log contain information based on knowledge that was given to you or made by someone else?
A. No, on my own observation, not by hearsay.
Q. It was not by hearsay at all?
A. Partly, and my own observation.
Q. What did you put down in there that was based on your own observation?
A. The place where the accident took place.
Q. But you did not see the accident, did you?
A. No, sir.

Q. You went there because you heard it happened there?
A. Yes, sir.
Q. You went down there at six o'clock?
A. Approximately six o'clock.
Q. That was on June 2nd?
A. Yes, sir.
Q. And when you went down there, tell us what you did first.
A. I went to Mr. Turner, my first assistant engineer, to inquire where it took place and how it took place and so on.
Q. So much for that, Chief. Just tell us what you did when you arrived at the scene of the accident.
[fol. 280] A. I looked over the place to see that everything was in order.
Q. Just tell us what part—I show you Plaintiff's Exhibit No. 1, and I will ask you to point out if you will, the particular spot at which you looked first.
A. I looked at this plate first of all.
Q. You looked at the plate first of all?
A. Yes.
Q. So much for that. You looked at the plate first?
A. Yes.

By the Court:

Q. By the plate you mean the step?
A. The step, yes.

By Mr. Engelman:

Q. That is the step plate which has been marked on the exhibit with the figure 1?
A. Yes, sir.
Q. Tell me why it was, Chief, that your attention was first directed to that plate.
A. Because there is where the accident took place.
Q. I understand, Chief——

By the Court:

Q. Who told you where it took place?
A. Mr. Turner, my first assistant engineer.

By Mr. Engelman:

Q. I understand, Chief, that the report which has been made here on the exhibit which is in evidence, being the mas-

ter's report, shows that this accident occurred by slipping [fol. 281] on the floor plates; now, this step is not a floor plate, is it?

A. No, sir.

Q. Is it true, that your first, second or third assistant told you that the accident happened on that step plate?

A. The accident happened on the floor plates and around the No. 4 bearing, the L. P. journal.

Q. In spite of the fact that you were told that the accident happened on the floor plates, the first thing you did was to look—I withdraw that—the first thing you did was to look at the step plate?

A. Yes, I looked at the plates, and the reason I did that——

Q. Just answer the question; your counsel will have an opportunity to bring out anything else you want to say; just answer my questions, please. After you looked at the step plate, what else did you do?

A. I looked at the bearings, the place around it, right around the journal.

Q. And did you do anything else, sir?

A. No, sir.

Q. I show you Plaintiff's Exhibit No. 2 and on that exhibit, Chief, you will see an L there.

A. Yes.

Q. Where that L is, what is that called?

A. An angle iron.

Q. And that angle iron is resting above the floor about how high, Chief?

A. About two inches.

Q. And what is the purpose of that, sir?

A. Well, the purpose of the angle iron is to fasten or secure the floor plates.

Q. Does it also have this function to prevent someone slipping in that opening there?

A. Yes, partly.

[fol. 282] By the Court:

Q. Is that the purpose? Do you know whether the man who built the ship put it there for that purpose, or is that for the purpose of tightening it to the floor?

A. Securing the floor plate and to prevent men from slipping further in there.

By Mr. Engelman:

Q. I ask you to direct your attention now to Plaintiff's Exhibit No. 1 again; will you look at the step plate and will you please tell us whether or not there is any raised edge or combing about the step plate to prevent a man from slipping off there?

A. Not on the edge. We have diamonds on the floor on the step plate to prevent slipping.

By the Court:

Q. What did you say you have?

A. Diamonds to prevent the foot from slipping.

Q. Is the step plate rough or smooth?

A. Partly rough on account of the diamonds sticking up about a quarter of an inch.

By Mr. Engleman:

Q. You say it is partly rough, sir, will you tell us in a little more detail what you mean by partly rough?

A. Well, in other words, through these diamonds, it has kind of recesses about 3/16ths of an inch high in the plate itself.

Q. That step plate is used while the vessel is at sea and the engine is in operation?

A. No, sir, it is never used at sea, to my knowledge.

Q. Not used at sea?

A. No, sir.

Q. Tell us what is the purpose of that step plate.

A. The purpose of this step plate is to be used in port [fol. 283] when repairing the engine, reaching overhead and washing down, cleaning the engine—not when the ship is out at sea, under no circumstances.

By the Court:

Q. Can you feel the main crankshaft without going on that step?

A. Yes, your Honor.

Q. The main shaft, the propeller shaft therein, you can feel without going on that step?

A. Yes, sir.

The Court: Go ahead.

By Mr. Engleman:

Q. The diamonds that you have stated are on the step plate, are also on the floor plates, are they not?

A. Yes, sir.

Q. And on this step plate there is no raised edge or lip to prevent a man from slipping off, is there?

A. Not on the edge, no.

Q. How tall are you, Chief?

A. 5 foot 8½.

Q. When you went down there, this step plate was about up to the level of your ankles?

A. About.

Q. So that you could then see the top of it?

A. Yes, I saw the top of it, of course.

Q. I call your attention to this grab-iron which is marked G in Plaintiff's Exhibit No. 1; will you tell us what the purpose of that grab-iron is?

A. The purpose of this grab-iron or handrail as I call it is when you are feeling the bearings, you take hold of the grab-iron with one hand, the right hand, on this particular bearing—you take hold with your right hand on the grab-iron and feel the bearings with your left hand.

[fol. 284] By the Court:

Q. Is the bearing to be felt by a righthanded person with his left hand then?

A. Yes, you can hold on with your right hand and feel with your left hand.

Q. Is any oil cup there?

A. Yes.

Q. How do you feel it, do you pour the oil with your right hand or left hand?

A. With my left hand.

Q. If an oiler is lefthanded, he would feel it with his right hand?

A. If an oiler is lefthanded—well, you can oil with the right or with the left hand.

Q. On every ship that you have been on, have you seen a righthanded man pour the oil with his left hand?

A. Anything stationary, can be held with either hand.

Q. I understand that. Anything that can be done with the right hand can be done with the left hand. Now, if a

lefthanded person were an oiler, with what hand does he do the oiling?

A. With the right hand.

Q. Does he ever oil with the left hand?

A. Yes, I have seen him oil with both hands.

Q. Some of them oil with the left hand. How about those men who oil that ship who put their right hand on the grab iron——

A. On this bearing there is no oil required.

Q. There is an oil cup there, isn't there?

A. There is an oil cup there, that drips continually and all that is required is to feel the bearing.

Q. What do you do when a bearing gets hot?

A. We open more feed on the bearing and also put on the water service.

[fol. 285] Q. Nobody ever uses the step plate while the ship is at sea?

A. That is right.

Q. They fill the oil cup?

A. Yes.

Q. With what hand would a man fill the oil cup who is righthanded?

A. I always tell my oilers how to fill——

Q. When you fill the bearing, where do you get the oil from?

A. From an oil container.

Q. Is that a can?

A. That is a can.

Q. With a nozzle on?

A. Yes.

Q. Tube and nozzle?

A. Yes.

Q. How is it carried, in his right hand?

A. In his right hand; when he fills the hole, he takes hold of the can and fills the hole with his left hand.

By Mr. Engelman:

Q. Step over here, Chief, I would like to hold this photograph up to the jury, sir. I would like you to explain this, sir. Let us assume that an oiler must feel this bearing here which is the opening which is designated by the figure 3 on the photograph; will you tell us what would be the correct and proper way to do that job, where he would have his

right hand, where he would have his left hand and where he would place his feet.

A. The oiler has no business whatever to stick his hand in the hole in the center, in the first place.

Q. I did not ask you that, Chief; please answer the question.

A. In order to feel the bearing, he would grab hold of this grab-iron with the left hand.

Q. With the left hand?

A. The right hand, I mean, I would stick my hand over [fol. 286] on the bearing which is approximately 4 feet and I feel the bearing there. I don't stick my hand down there in the oil. I have no business to do that and no oiler has any business to stick his hand in that oil. You must feel the bearing; you don't need to stick your hand here. All you have to do is put your hand on the bearing to feel the temperature.

Q. Can you illustrate on that picture, Chief, where the bearing is, where he would have to feel?

A. He would have to feel here on the edge of the bearing. There is a shaft going through the bearing. The shaft is 15 inches in diameter. The distance from here to here (indicating) is about 43 inches. There is plenty of room in which to feel that bearing, and nobody has any business to stick their hands in the oil.

Q. Where is the cup that fills that bearing?

A. There is the cup.

Q. You say that is automatic?

A. That is automatic, adjusted.

Q. What is the purpose of this hole which is designated by the figure 3?

A. The purpose of the hole, I don't know definitely what the purpose of the hole is, because I have been with engines, with no hole whatever.

Q. Through that hole you can feel the bearing, can you not?

A. You can, yes, sir.

Q. And down in here—will you let me have your fountain pen—would you make the letter S right there where the bearing is supposed to be?

Mr. Potter: Just a minute, I object to the question and I object to it on the ground of "where the bearing is sup-
[fol. 287] posed to be." I have no objection to the witness

pointing to where the bearing is, but I object to any suppositious case.

The Court: You have no right to say put a letter there where something is supposed to be.

By the Court:

Q. Where is the bearing?
A. Right here.

The Court: Mark the bearing.

By Mr. Engelman:

Q. Is that this white part that is there?
A. This is a composition of brass and white metal, what we call the bearing. This is the real bearing right here (indicating).
Q. Put the letter S there, so that we can understand it, Chief.
A. All right.
Q. The man would stand on the floor plates here?
A. Yes.
Q. With his right hand on the grab-iron?
A. Yes.
Q. With his left hand he would reach over the top of the slush pan?
A. No, you don't have to reach over the slush pan.
Q. You reach diagonally through the sides?
A. No, the slush pan is too far from this here; you don't have to reach over the slush pan. There is a straight line here from the side.

By the Court:

Q. What do you call that?
A. That is the crank guard.
Q. What is the distance between the crank guard and what you call the slush pan?
A. I should say about 18 inches.
[fol. 288] Q. In the picture it looks as though it were very close by.
A. Yes, it does.
Q. You say there is a distance there of what?
A. The slush pan is an eccentric pan, as I call it.
Q. What did you say the distance was?

A. About 3 feet between the guard and the slush pan, so when he grabs hold here, this slush pan is out of reach altogether, because when I reach from here to there (indicating) the slush pan is further up.

Q. How far is it from G to S on that picture?

A. About 43 inches I should say.

By Mr. Engelman:

Q. Did you ever measure that, Chief?

A. Yes, I did measure it.

Q. When did you measure it?

A. About five weeks ago. I measured it from here down to the center of the bearing itself.

Q. Up there (indicating)?

A. Yes.

Q. How many inches was that?

A. 51.

Q. 51 inches. At this point that you designated with the letter S, there isn't any guard on the bearing, is there?

A. On the bearing? No. There is one guard, there is a handrail.

Q. But there is no guard here over the S?

A. Over the S is no guard.

Q. Let me show you Plaintiff's Exhibit No. 2——

The Court: Your bill of complaint alleges that the accident happened through the striking of his foot against the bracket or piece of the bracket.

Mr. Engelman: Yes.

The Court: That is your theory of the accident?

[fol. 289] Mr. Engelman: That is our theory of the accident, just what the plaintiff has testified to.

The Court: I know what the plaintiff testified to. Now you make your answers responsive too.

Mr. Engelman: I am sorry; I hope I have not offended you.

The Court: Your theory of the accident, if I remember your bill of particulars and his testimony is that when he got off the step he struck a bracket.

Mr. Engelman: That is true.

The Court: So you must fail or recover on that theory.

Mr. Engelman: That is right.

Q. In connection with this Plaintiff's Exhibit No. 2, in order for an oiler to reach the bearing which you designate

as S on Plaintiff's Exhibit No. 1, the oiler would have to pass his arm and part of his body over and through the opening between the slush pan and the step plate, is that right?

A. I don't understand this.

Q. In order for an oiler to reach the bearing designated S in Plaintiff's Exhibit No. 1, that is the photograph that you have just looked at——

A. Yes.

The Court: Will the witness please put an S on this photograph—put an S on Exhibit 2.

The Witness: All right.

By the Court:

Q. Where is the slush tray; what is it marked on the picture Exhibit No. 1?

A. It is designated 4 on the photograph No. 1.

[fol. 290] The Court: Put a 4 there.

The Witness: All right. (Marks.)

The Court: And put the letter G for the hand-grab.

The Witness: All right. (Marks.)

The Court: Put down an X for the shaft guard—or what is that?

The Witness: Crank guard.

The Court: Put a corresponding number there.

Mr. Engelman: We have not designated that.

The Court: All right, put an X there.

(Witness marks.)

By Mr. Engelman:

Q. In order for an oiler to reach the bearing designated S in Plaintiff's Exhibit No. 2, he would have to reach in with his left hand over the opening behind the angle iron designated L?

A. Yes.

Q. And this opening behind the angle iron designated L was in substantially the same condition on June 2nd of 1935, as is indicated by that photograph Plaintiff's Exhibit No. 2?

A. Yes.

Q. I believe you testified that the plaintiff engaged in an altercation or some kind of a scuffle or fight; when did that occur?

A. The day before the accident.

Q. What day was that?

A. June 1st.

Q. And how do you recall that it occurred on June 1st; what makes you remember that?

A. Yes, I do remember it clearly because we have very few fights on the ship in the first place and it is very seldom that I am called upon to separate anyone fighting, which [fols. 291-294] I was on this occasion, and the fight was in progress when I came down the ladder.

Q. Who called you to separate them?

A. I don't know who called me to separate them because I did not pay attention to who it was.

Q. All right, Chief, who was the plaintiff fighting with?

A. An oiler—the 12 to 4 oiler.

Q. What is his name?

A. I don't recall his name. He is a Spanish fellow, I understand.

Q. Have you seen this 12 to 4 Spanish oiler since the fight?

A. I have not.

Q. When did he leave the ship?

A. That I could not tell you.

Q. You continued with the Yankee Arrow, didn't you?

A. I did.

Q. Do you know at what port he paid off?

A. No, I couldn't say.

Q. Was he the only Spanish oiler that you had on the ship?

A. Yes, I think he was the only Spanish one.

Q. Was his name Lopez Rodriguez, does that refresh your recollection in any way?

A. Something like that, I do believe.

Q. Some similar name?

A. Similar.

Q. You think he paid off at Beaumont about June 4th?

A. I could not recollect.

. . . . . .

[fol. 295] Q. You have no recollection as to when this oiler who fought with Smith was paid off, have you, sir?

A. No, sir.

Q. Where did the fight take place?

A. Outside the mess room down below the after-deck.

Q. Who was there?

A. I was there. I came down when the fight was in progress.

Q. Who else was there aside from the participants in [fol. 296] the fight?

A. Smith and this other oiler were there. They were fighting.

Q. They were fighting?

A. They were fighting.

Q. Were they striking blows?

A. Yes, sir.

Q. What part of the body were they striking?

A. Mid-section.

Q. That is, you mean from the neck down?

A. No, from the hips—the middle of the body.

Q. They were not directing any blows to the head, were they?

A. No, not what I saw.

Q. They were all directed to the mid-section, and Smith was struck here in the hip, is that right?

A. I did not notice exactly where the blows were struck.

Q. But they looked to be struck around here?

A. In the mid-section of the body.

Q. And Smith was knocked up against something, was he?

A. Well, the space is kind of narrow; we have a stairway going up and an iron rail around the stairway going down.

Q. In this scuffle, he was knocked up against this rail?

A. Naturally when a fight takes place a man don't stand absolutely still.

Q. And the back part of his body struck up against the rail?

A. Part of his side or back.

The Court: Whose back?

Mr. Engelman: Smith's?

The Witness: Smith's.

Q. And he was hurt?

A. That I don't know.

Q. Did you make any report of this fight, sir?

A. No, sir.

Q. You didn't make any entry of it in the log book?

A. No, sir.

Q. You did not give him any first-aid treatment of any kind?

A. No, sir.

[fol. 297] Q. He wasn't logged, was he?

A. No, sir.

Q. Neither participant was logged?

A. No, sir; as I told them to separate they separated, and then it was over.

Q. When did you first discuss this fight with anyone?

A. I think about five weeks ago.

Q. That was the first time you had occasion to discuss the fight?

A. The fight, yes.

Q. So that the thing was completely out of your mind until it was revived five weeks ago by a conversation?

A. Yes.

Q. And who did you have that conversation with?

A. I believe it was with Mr. Courtade.

Q. And so from June 1st, 1935, down to five weeks ago, you remember it?

A. Yes, sir.

Q. I mean this fight?

A. Absolutely.

Q. And a number of those blows were struck in the mid-section?

A. Absolutely.

Q. And the plaintiff Smith was knocked up against the rail?

A. Yes.

Q. And hit his back against the rail?

A. I would not say the back; the space was narrow and as the fight was in progress, he hit the rail or stairway.

Q. Who seemed to be winning this fight?

A. Now, I don't know that, because neither seemed to be winning; it was about even, I should think.

Q. You have the right, as chief engineer, to inflict punishment in the way of logging the men for disobeying the rules of the ship, have you not?

A. Yes, I have.

Q. But you did not log them?

A. No.

Mr. Engelman: You may question him.

Mr. Potter: No further questions, Chief; will you step down.

[fol. 298] WILLIAM E. ROBERTSON, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Potter:

Q. Mr. Robertson, where are you employed at the present time?

A. I am a stationary engineer in the Long Island College Hospital on Henry Street in Brooklyn.

Q. Have you ever been to sea?

A. Yes, sir, I first went aboard ships in 1916.

Q. For how long did you continue to go to sea?

A. Well, I have been ashore now approximately 18 months. Previous to that time I had a continuing stretch in the engineering department of a merchant ship of over six years.

Q. Do you hold any certificates, Mr. Robertson?

A. Yes, I have a second issue chief engineer's steam license, any tonnage, any waters; I also have chief engineer's Diesel license any tonnage, any waters; Panamanian license for any size steam vessel, also a stationary engineers' license, third class, which entitles me to handle any job in the City of New York.

Q. Do you know the S.S. Yankee Arrow?

A. Yes, I joined the Yankee Arrow May 26, 1935, as third engineer.

Q. How long were you on her?

A. I made three trips and I was transferred at the end of the third trip down at Texas City; then went overland over 110 miles to join the Java Arrow, another ship of the Standard Oil Company.

Q. How long did you continue in the employ of the Standard Oil Company?

A. I was four months and nineteen days on the Java.

Q. How long were you employed by them?

[fol. 299] A. Approximately seven months, then I left the company and went north.

Q. Since then have you been employed by them?

A. No, I have not been employed; I have been ashore working as engineer approximately 17-18 months; I worked for Rubel, the big ice people.

Mr. Potter: May I have Plaintiff's Exhibit No. 1 and Plaintiff's Exhibit No. 2?

Q. I show you a photograph which has been marked Plaintiff's Exhibit No. 2 and direct your attention to the floor plate which appears in the foreground of that photograph and ask you whether you can oil the bearings—feel the bearings with both of your feet on that plate?

A. Yes, a man of average reach can feel the bearings and oil them from standing on the floor plates.

Q. I direct your attention to a grab-rail which appears in that photograph; do you observe it?

A. Yes.

Q. Tell us, if you will, please, what is the purpose of that grab-rail?

A. That is to make the occupation of the man employed there—that is to protect the man; the purpose of the handrail is to keep your hand on to prevent any accident. That is this handrail right here.

Q. Is it possible to stand with your feet on the floor plates, grasp with your right hand that handrail and so feel the bearing?

A. Yes, it is very easy to be done.

By the Court:

Q. To stand on the floor plate?

A. Yes.

Q. And hold the grab-iron?

A. Yes.

[fol. 300] By Mr. Potter:

Q. You observe that there is illustrated in that photograph a step plate; do you observe it, Mr. Robertson?

A. Yes, I do.

Q. When feeling the bearing is it necessary to step upon that step plate when feeling the bearing?

A. No, sir, it is not absolutely necessary. That plate is placed there for maintenance and repair work on the bottom ends and also other parts of the engine.

Q. Were you on the voyage of the Yankee Arrow which commenced in Baltimore in May, 1935, for Beaumont and from Beaumont to return to Quincy, Massachusetts?

A. Yes.

Q. In what capacity did you serve on that voyage?

A. I was third assistant engineer.

Q. And in that connection did you observe the engine room and were you about the engine room of the S.S. Yankee Arrow?

A. I did the two watches—the two 8 to 12 watches each day, so I must have been down there.

Q. Now, at any time on this voyage did you ever observe a strut or support or bracket underneath the step plate shown in that photograph?

A. Well, it is very evident here, you can't see it in the picture.

Mr. Engelman: I object to that, on the ground that he is not answering the question.

The Court: Answer the question.

A. Yes, I see the bracket there, the angle plate which secures the guard plate around the crank.

Q. Was there ever any bracket beneath the step plate [fol. 301] shown in that photograph?

A. No bracket there whatsoever. The step plate is secured positively to the main frame of the engine.

Q. And was there at any time any support or strut under the step plate shown in that photograph?

A. Only the small angle that holds the guard rail, the guard plate to the crank frame.

By the Court:

Q. Holds it to what?

A. To this guard, this sheet metal plate.

By Mr. Potter:

Q. Was there any time on that voyage of the S. S. Yankee Arrow from Baltimore to Beaumont when this step plate was loose?

A. No, sir.

Mr. Potter: You may inquire.

Cross-examination.

By Mr. Engelman:

Q. How long have you been in the employ of the Long Island College Hospital?

A. Why, approximately three months. The last part of March I went on the job there; previously I worked in the same hospital some ten years ago, when the present chief there took over the job I worked there for a short time, then I went back to the ships.

Q. You have a chief engineer's license, have you?

A. Yes, two of them.

Q. That license is still in force, is it not?

A. Absolutely good.

Q. And you intend to return to sea at some time?

A. Well, I don't know, perhaps in future years I might go back in the ships, but I am very well satisfied with the [fol. 302] job I have here. The conditions are very good, so therefore I stay ashore.

Q. You didn't see this accident, did you?

A. Positively no.

By the Court:

Q. Did you ever see the plaintiff oil a bearing?

A. You mean this 4 to 8 oiler?

Q. Yes.

A. No, I relieved the first engineer for his supper hour. As soon as he gets down from the mess room I come down to my supper and the same thing applies to the oiler.

By Mr. Engelman:

Q. Now I show you Plaintiff's Exhibit No. 2, where you see the letter S there, the chief engineer has testified that that is a bearing, is that correct?

A. Yes, that is the edge of the casting which contains the babbitt metal.

Q. That is a casting?

A. Yes, casting and the bearing itself. This babbitt metal which is a soft metal and the bearing is cast in this casing.

Q. So that the bearing is inside the casing designated as S?

A. Yes, it is inside of that.

By the Court:

Q. Describe to the jury what you call the bearing; it is just a matter of definition; tell us what it is.

A. A bearing is an object which supports a moving crankshaft, whether it is in an automobile, steam engine, turbine or a Diesel.

Q. Of what does a bearing consist?

A. A bearing consists of a housing or casing in the [fol. 303] framework of an engine. Furthermore, the outside shell in which the bearing—the metal itself is a soft metal and bored out and fitted to the crankshaft.

By Mr. Engelman:

Q. The bearing is made hot if the driveshaft or propeller shaft is not properly lubricated, is that correct?

A. Yes, if he does not get a supply of oil there, you are bound to get it hot; did you ever burn out a bearing in your car?

Q. I don't know much about mechanics, sir. If the driveshaft or propeller shaft is hot, then it must follow that the bearing is hot, is that right, sir?

A. Yes, sir, it is bound to get hot if you do not have a sufficient supply of oil, also circulate water around the casing, it is going to run hot.

Q. At that particular point designated in the photograph, Plaintiff's Exhibit 2, a man reaching in there to feel would feel the casing that goes around the bearing; he would not feel the bearing itself, would he?

A. He feels the metal, the babbitt metal.

Q. That surrounds the bearing?

A. That surrounds the bearing. That is where your heat would generate the first thing, because the babbitt is a soft metal. The heat is generated in the babbitt metal first.

Q. The heat comes from the propeller shaft?

A. From the crankshaft.

Q. If you direct your attention to the figure 3 on that photograph, Plaintiff's Exhibit No. 2, there is a hole or opening there, is there not, sir?

A. Yes, there is a hole or opening in the top of the cover for the main bearing.

[fol. 304] Q. And that opening leads right down directly to the crankshaft, doesn't it?

A. Yes, down to the main journal of the crankshaft. It goes right down on top of the crankshaft.

By the Court:

Q. But not to the bearing?

A. This is a space here, an opening, there is an opening below in the top part of the bearing.

By Mr. Engelman:

Q. I would like a little instruction here. I don't know anything about the situation; you said that it leads down to the journal.

A. Yes.

Q. The journal is one thing and a bearing is another, is that right?

A. The same term applies to the same thing, bearing and a journal. The journal is this part here and the bearing is what it runs in.

Q. If a man stuck his hand down in that hole which is designated by the figure 3 on Plaintiff's Exhibit No. 2, what would he feel down in there?

A. He would feel a mist of oil.

Q. Could his hand touch the crankshaft?

A. Yes, if he put his fingers down there.

Q. Would he also feel the bearing?

A. He would not feel the bearing along the edge of the bearing metal. His fingers would touch the crankshaft, it is a journal so-called.

Q. So he could determine whether the crankshaft was running hot?

A. Yes, by feeling there—feeling on the side where you have marked S on that.

Q. Which would you say was the best place to feel, the [fols. 305-309] place marked S or to feel the crankshaft itself?

A. Well, ordinarily the best place to feel is the side of the bearing.

Q. The side of the bearing marked S?

A. It is only in case of extreme trouble that it is necessary to get your fingers and hand down in the bearing cap.

Q. What is the hole there for if it is not to put your hand down there to feel it?

A. It is there for putting additional oil in the bearing in case you want to get more oil, you can put it in there.

Q. And the only way you can determine that is by putting your hand down through and feeling if there is a sufficient supply of oil?

A. You can put your hand down there if you wish to.

Q. And that is the only way to determine that. That is all, no further questions.

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[fol. 310] SANTIAGO LATIERRO, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Potter:

Q. Mr. Latierro, you are a seaman?

A. I am.

Q. How long have you been going to sea, Mr. Latierro?

A. Since 1917.

Q. Do you know the S.S. Yankee Arrow?

A. Very well.

Q. Did you ever serve on her?

A. I have been serving continuously for the last couple of years.

[fol. 311] By the Court:

Q. Do you work on it now?

A. I have been working ever since April 30th, that is the time I joined the ship, April 12, 1935, and I have been in ever since.

By Mr. Potter:

Q. Were you serving on the S. S. Yankee Arrow on the voyage commencing at Baltimore the latter part of May, 1935?

A. Yes, sir.

Q. You were a fireman aboard?

A. Fireman.

Q. And you continued with the ship until she docked at Beaumont?

A. Yes, sir.

Q. Now then, do you know a man named Herbert Smith?
A. Yes, sir, very well.
Q. Was he on that voyage?
A. He was.
Q. Directing your attention to June 2nd, 1935, did you ever take Mr. Smith upstairs to the deck on June 2nd, 1935?
A. I did not take Mr. Smith upstairs.
Q. On that day did you throw any water on him?
A. I did not throw any water over Mr. Smith.
Q. Now, did you see Mr. Smith on June 4, 1935, when the S. S. Yankee Arrow was at Beaumont?
A. I saw Mr. Smith that particular day.
Q. Did you see him go ashore?
A. I did, sir.
Q. Did you see him carry anything on that occasion?
A. He carried one suitcase in one hand.
Q. Was there anyone assisting him?
A. I could not tell you sir.
Q. But you saw him?
A. Yes.
Q. And he was carrying a suitcase?
A. Yes, one.

[fol. 312] Mr. Potter: That is all.

Cross-examination.

By Mr. Engelman:

Q. You left the Steamship Yankee Arrow on what date?
A. The best I can remember, it was the 30th or 31st of April—I don't remember whether April has 30 or 31 days in the month.
Q. At what port did you leave the ship?
A. New York City.
Q. What was the reason for your leaving the ship?
A. To be a witness in this particular case.
Q. You have been waiting here to testify since that time?
A. Since that time.
Q. And during that time you have got your wages?
A. Yes, sir.
Q. You have not been working?
A. Sir?
Q. I say you have got your wages, although you have not been working?

A. Correct.

Q. Where have you been living since you left the Yankee Arrow?

A. I have been living since I left the Yankee Arrow at two different places at New York City.

Q. Have you been living with the rest of the witnesses in this case?

A. I did not. I am all alone.

Q. What was your watch on June 4th of 1935 when the ship was at Beaumont; what watch did you have?

A. I have been the 4 to 8 watch for the four years' time, never changed.

Q. While the vessel was at sea, what were your duties during the day?

A. No day work; I never did day work.

Q. You worked four hours in the morning?

A. Surely, from 4 to 8.

[fol. 313] Q. Then again in the afternoon?

A. 4 to 8 in the afternoon, yes, sir.

Q. Did you have any conversation with anyone in connection with this case before you took the witness stand?

A. Yes, I have been having a conversation about it.

Q. With whom?

A. With the lawyer of the company.

Q. You mean Mr. Potter here?

A. Yes.

Q. When did you talk to Mr. Potter last?

A. Well, I have been talking this morning so far——

Q. What was the nature of your conversation with him this morning?

A. The conversation between Mr. Potter and myself was to swear and saying nothing but the truth whatever I know about that case.

Q. Before you spoke to Mr. Potter, when you came here in April, you made a statement at the company's office, didn't you?

A. Yes, I did.

Q. Did that statement have anything in it about a suitcase?

A. It did not have any statement about the suitcase.

Q. When did you first make any statement about the plaintiff carrying one suitcase?

A. This particular day when Mr. Smith testified in court when he said he was leaving the ship——

Q. It was only after you heard him testify that you discussed that matter with counsel for the company?

A. Yes, sir.

Q. Not before that time?

A. Not before that.

Q. What time did you see him go ashore on June 4 of 1936; what time of day was that?

A. Well, it was before noontime, as best I can remember.

Q. Before noontime?

A. Yes, sir.

[fol. 314] Q. About how much before noontime?

A. Well, it might be eleven o'clock, ten or half-past eleven, I cannot mention exactly the time.

Q. You had the 8 to 12 watch?

A. No, sir, the 4 to 8 always.

Q. You had worked from 4 in the morning until 8 o'clock in the morning?

A. Correct.

Q. Then you turned in to your bunk, didn't you?

A. No, it is customary when a man is in port to read mail, newspapers or magazines, because my work is not so hard that a man has to go to sleep as soon as he goes off duty.

Q. The first opportunity you had to go ashore was at 8 a. m. in the morning of June 4th when the vessel was at Beaumont?

A. Yes, sir.

Q. But you did not go ashore?

A. I did not.

Q. You stayed on the ship?

A. Yes, sir.

Q. Then you saw Smith go ashore about what time?

A. Before noontime some time.

Q. He had his bag with him?

A. Yes, sir, two bags.

Q. Where were you on the ship at the time, what part; were you in your room?

A. No.

Q. Were you on deck?

A. There is a passageway——

Q. Would you illustrate on Defendant's Exhibit I where you were when you saw Smith go ashore with the bag in his hand?

A. I was on the outside of the crew's quarters.

Q. Will you point that out, please, sir, on this exhibit; will you step down here?

Mr. Potter: Your Honor, I think the question should be propounded whether he can see the crew's quarters on this model.

Mr. Engelman: All right, I withdraw the question.

[fol. 315] Q. Can you see the crew's quarters on this model?

A. You cannot see it from here.

Q. Can you designate it from below?

A. There is an entrance from the top deck to the second deck of the engine room department quarters; it is located in this part of the ship. One side is for the sailors and the other one is for the engine room department; this is for the engine room department.

Q. That would be the port side?

A. That is the port side.

Q. So you were down there in the closed deck?

A. On the second deck where is the crew's quarters.

Q. When I say closed deck, there was an upper deck above?

A. There is no upper deck, only for entrance, that is all.

Q. You were in the alleyway there?

A. Yes, sir, I can describe you how that is if you don't mind.

Q. Just a second, I will ask a couple of questions and your counsel can bring that out if he wishes.

You saw him walk out of his room?

A. Yes.

Q. With a bag in one hand?

A. With a bag in one hand.

Q. How big was the bag?

A. About that size, I should say two feet square, you know.

Q. About two feet square?

A. That is right.

Mr. Engelman: No further questions.

(Recess until 2:15 p. m.)

[fol. 316] Afternoon Session

DANIEL MCKIGGAN, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Potter:

Q. Mr. McKiggan, what is your occupation, please?

A. Well, I sail in all departments in the engine room under a licensed officer.

Q. How long have you been going to sea?

A. 30 years.

Q. Do you know the S. S. Yankee Arrow?

A. Yes, sir.

Q. Did you ever sail on the S. S. Yankee Arrow?

A. Yes, sir.

Q. Directing your attention to the year 1935, did you make a voyage on the Yankee Arrow commencing at Baltimore on May 28 of 1935?

A. Yes, sir.

Q. In what capacity did you serve on this voyage from Baltimore to Beaumont?

A. As fireman.

Q. And did you continue with the ship from the time it sailed until she arrived at Beaumont?

A. Yes, sir.

Q. She arrived at Beaumont on June 4, 1935, is that correct, sir?

A. Yes, sir.

Q. Directing your attention, if I may, please, to June 2nd, 1935, on that day did you see a man named Herbert Smith?

A. Yes, sir.

Q. Was Mr. Smith serving on the S. S. Yankee Arrow on this voyage?

A. Yes, sir.

Q. In what capacity was Mr. Smith serving?

A. 4 to 8 hour oiler.

[fol. 317] Q. Did you see Mr. Smith on the forenoon of June 2nd or in the afternoon of June 2nd, 1935?

A. I saw him in the evening of June 2nd.

Q. At about what time was it, Mr. McKiggan, that you saw him?

A. Around 5:30, I should say.

Q. Where were you at that time?

A. Standing up on the after-deck.

Q. That is the after-deck of the S.S. Yankee Arrow?

A. Yes, sir.

Q. Did you go anywhere with Mr. Smith on the ship that afternoon or evening?

A. No, sir.

Q. Did you go up to the captain's bridge or the captain's quarters with Mr. Smith?

A. No, sir, but I told him to go to see the captain.

Q. Did you have a conversation with Mr. Smith?

A. Yes, sir.

Q. Tell us if you will, briefly, what Mr. Smith said to you and what you said to him.

. . . . . .

[fol. 318] By the Court:

Q. Did you see the accident?

A. No, sir.

The Court: He did not see it; he is telling nothing about the occurrence; go ahead.

By Mr. Potter:

Q. What did Mr. Smith say to you?

A. He told me that he slipped and pretty near went into the crank pit.

Q. Then what did you say to him?

A. I says, "How bad are you hurt?" He showed me his hand.

By the Court:

Q. What else did he say to you; is that all he said?

A. He showed me his fingers and his side where he had a bruise, I think, and he said he pretty near fell into the crank pit. I told him, "Smith, don't argue with me; better go up and see the captain right away."

By Mr. Potter:

Q. Did you go up to the captain with him?

A. No, sir.

Q. Did you see him walk forward towards the captain's bridge?
A. Yes, sir.
Q. Did anyone accompany him?
A. I did not see anyone.

Mr. Potter: That is all.

[fol. 319] By the Court:

Q. When was it you first saw him?
A. I saw him about 5:30.
Q. Was anybody with him when you saw him?
A. No, sir.
Q. Where was he when you saw him first?
A. I was standing on the after-deck.
Q. Was he walking?
A. He was walking, yes. He come up the hatch.
Q. Did you see him come up the hatch?
A. Yes, sir.
Q. With whom did he come up the hatch?
A. Alone.
Q. He went alone up the hatch?
A. Yes, sir.
Q. Could you see the hatch where you were?
A. Yes, sir.

Cross-examination.

By Mr. Engelman:

Q. When did you leave the Yankee Arrow?
A. I left her on July 3rd.
Q. Of what year?
A. 1935.

By the Court:

Q. For whom are you working now?
A. At present for no one.

By Mr. Engelman:

Q. When were you last employed at sea?
A. I was last employed at sea April 26th.
Q. Of what year, sir?
A. This year, sir.

Q. April 26th of this year?
A. Yes, sir.
Q. What ship were you employed on?
A. The S.S. Tiger.
Q. That is operated by this defendant, isn't it?
A. Yes, sir.
[fol. 320] Q. You left that ship for the purpose of appearing as a witness here?
A. No, sir.
Q. Why did you leave the Tiger?
A. I quit the ship in Baltimore.
Q. You quit in Baltimore?
A. Yes, sir.
Q. And how long did you remain in Baltimore?
A. A few hours.
Q. Then, what did you do?
A. I paid my fare to New York.
Q. When you got to New York, what did you do?
A. I went over to the Seamen's Institute.
Q. How long did you remain there?
A. I was hanging around there, and seeing a notice on the board that had been there for some time inquiring for me and two or three others to report to the Standard Oil office.
Q. And you went to that office approximately when?
A. On or about the 28th.
Q. Of April?
A. Yes, sir.
Q. Whom did you see there?
A. I saw Mr. Bailey.
Q. Mr. Bailey?
A. Yes, sir.
Q. And you have been supported by the Standard Oil Company from that time on down to the present time haven't you?

Mr. Potter: I object to the question on the ground that it calls for a conclusion. I direct my objection particulary to the word "supported."

The Court: Objection sustained.

Q. Have you received any money?
A. I received my wages. I was automatically put on the payroll.

By the Court:

Q. Are you on the payroll?
A. Yes, sir.

[fol. 321] By Mr. Engelman:

Q. Are you on the payroll at the present time?
A. Yes, sir.
Q. When did you first make a statement in this case?
A. On or about April 28th.
Q. And that statement was made to whom?
A. Mr. Bailey.
Q. What were the contents of it briefly?
A. I could not tell you that.

Mr. Potter: I object to that on the ground——
The Court: Objection sustained.

Q. Have you seen the statement since that time?
A. No, sir.
Q. You were in court here when Mr. Smith testified, were you not?
A. Yes, sir.

By the Court:

Q. You say you made a statement; you mean you made a statement in writing?
A. Well, they just asked me questions.
Q. Did you sign any written statement?
A. I signed a brief, yes, sir.
Q. You did sign a statement.

By Mr. Engelman:

Q. Have you had any conversation with anyone since you signed the statement?
A. No, sir, only with the counsel here, the lawyer,
Q. Mr. Potter?
A. Yes, sir.
Q. And you talked to him since the plaintiff testified, have you?
A. No.

[fol. 322] Q. As I understand it, since the plaintiff testified in this case, that was on Wednesday I believe, you have not talked to Mr. Potter in connection with the case at all?

A. No, sir, I haven't.

Q. Have you talked to either Mr. Nugent or Mr. Cortez?

A. No, they only told me the first day to tell the truth, just the way I seen it, that is all.

Q. Was Smith bleeding at the time?

A. His fingers.

Q. Was he bleeding any other place?

A. No, sir.

Q. You testified on direct examination about a bruise or some condition on the right hip; what did you mean by that?

A. Well, it was like a fellow scraping himself against a rough wall; he gets—I don't know, what you call it an abrasion.

Q. Was his clothing torn?

A. He pulled his undershirt up and showed me it.

Q. That was on his right side?

A. Yes, sir.

Mr. Engelman: No further questions.

Mr. Potter: That is all.

By the Court:

Q. What did he say to you when he came; tell us all he told you.

A. What did he tell me? He said he slipped.

Q. Did you ask him anything, where?

A. I asked him where, yes.

Q. What did he say?

A. He said it was around the L. P. journal.

Q. What else did he say?

A. He said he pretty near fell in the crank pit.

Q. You say he said he pretty near fell in?

[fol. 328] A. That is what he said, he pretty near fell in the crank pit.

Q. Is that all he said?

A. Yes.

Q. What did you ask him then?

A. I just didn't ask him anything.

Q. You didn't ask any other questions?

A. No, sir.

Q. What else did he say?

A. He didn't say anything out of the way. I was just looking at his hand and I told him, "You better go up and

see the Captain; don't feel around here. See him right away."

Q. Is that all he said?

A. That is all.

By Mr. Engelman:

Q. Just a minute, Mr. McKiggan. You served as an oiler, haven't you, sir?

A. Yes.

Q. And the crank pit is one thing and the bilge is another, isn't it?

A. Yes, sir.

Mr. Potter: Your Honor, if this witness is going to be interrogated or an attempt made to qualify him as an oiler and expert I call your Honor's attention that he is making the witness his own witness.

By the Court:

Q. Did you work in the engine room?

A. I had. Not on that ship.

Q. Not on that ship?

A. No, sir.

Q. What were you doing on that ship?

A. Fireman.

Q. Did you ever see Smith in the engine room?

A. Yes, sir.

Q. Did you see him there?

A. Yes, sir.

Q. Did you ever see Smith working in the engine room?

A. I have seen him around, yes.

[fol. 324] Q. What?

A. Yes, sir, I have seen him make the rounds.

Q. What did you see him do?

A. Just ordinary routine.

Q. What?

A. Just the ordinary routine.

Q. What did you see him do?

A. Oiling around the engines.

Q. Did you ever see him oil?

A. Yes.

Q. Did you ever see him touch any bearing?

A. I never took any particular notice, sir.

Q. You never saw him feel any bearing?
A. Never took any notice of it.

Mr. Engelman: No further questions.
Mr. Potter: That is all, Mr. McKiggan.
Will you step down please. Mr. Hamilton, will you take the stand, please.

THEODORE HAMILTON, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Potter:

Q. Mr. Hamilton, what is your occupation?
A. I served as an oiler most of the time.

The Court: What?
The Witness: Oiler.

Q. How long have you been going to sea, Mr. Hamilton?
A. About 10 years.
Q. Do you know the S.S. Yankee Arrow?
A. I do.
[fol. 325] Q. Did you ever serve as an oiler on the S.S. Yankee Arrow?
A. I did.

* * * * * * *

Q. Mr. Hamilton, were you on a voyage from Baltimore to Beaumont commencing in May, 1935?
A. I was.
Q. And on that voyage did you serve as an oiler?
A. I did.
Q. Do you know a man named Herbert Smith?
A. I do.
Q. Was he also serving on the S.S. Yankee Arrow on this voyage?
A. The 4 to 8 watch.
Q. Was your watch, 4 to 8 also?
A. 8 to 12.
Q. Your watch is 8 to 12?
A. I always relieved Smitty at 8 o'clock.

Q. And did you stand those watches all during the voyage from Baltimore to Beaumont?

[fol. 326] A. Those watches and every day at five o'clock I had to relieve him for supper, every evening.

Q. You would relieve Mr. Smith?

A. Yes, sir.

Q. And about what time was the evening meal or supper?

A. When I went below they struck two bells to indicate it was five o'clock and I relieved him to come up for his supper, which takes about 25 minutes.

Q. Did you see Mr. Smith on the afternoon of June 2nd, 1935?

A. I did.

Q. Did you have a conversation with him? Did you speak to him?

A. Yes.

Q. Did he speak to you?

A. He spoke to me, yes.

Q. And where were you when he spoke to you?

A. I was in the engine room. Oh, up on deck. He spoke to me a couple of times in the evening.

By the Court:

Q. When is the first time on June 2nd you saw him?

A. Four o'clock in the morning.

Q. When did you see him after that?

A. I saw him after that at 12 o'clock noon.

Q. At that time was he all right?

A. He was all right at that time, yes.

Q. When did you see him after that?

A. I saw him that evening at 5 o'clock.

Q. At about 5 o'clock where?

A. In the engine room.

Q. Where?

A. In the engine room.

Q. Did you speak to him?

A. I spoke to him, yes, sir.

Q. Did he speak to you?

A. Yes, sir.

Q. What did he say and what did you say?

A. Well, just "good evening."

[fol. 327] Q. What?

A. "How do you do" or something like that.

By Mr. Potter:

Q. Directing your attention to about 5.30 in the afternoon, where were you at that time?

A. At that time I was sitting up on the poopdeck on a bitt.

Q. Did you there see Mr. Smith?

A. Well, I guess I saw Mr. Smith about 5.40.

Q. Tell us where you saw him.

A. Well, he come over to me and he says the first engineer says come below and relieve him, that he had to go to the skipper and get his hand dressed.

The Court: Repeat that, I didn't hear it.

The Witness: He said he had to go up to the skipper and get his hand dressed and the engineer said for me to come below and relieve him.

Q. And then after he said that to you where did you go?

A. In the engine room.

Q. And what did you do?

The Court: Who told you to relieve him?

The Witness: Smitty told me to relieve him. He said the engineer says to come below, so then I go below and I go over to the first assistant. I said, "Smitty said for me to report to you." I said that he said he got hurt.

"Where did he get hurt?" and he showed me.

[fol. 328] Q. Did you remain on that watch after you went below?

A. I stayed there until 6 o'clock.

Q. Of that afternoon?

A. Of that afternoon.

Q. Did Mr. Smith return to the engine room?

A. He did at 6 o'clock and stayed from 6 o'clock, around, on.

Q. And relieved you and you went?

A. Yes, sir. First I asked him, I said, "Do you want me to stay?" and he said, "No." He said he can oil with one hand, or something like that, like anybody would say.

Q. And did you see him do anything after he made this statement to you?

A. Well, he went over and stood at the ventilator.

Q. Did what?

A. Stood under the ventilator.

Q. And where did you go?

A. I went on up because I had to go back on watch at 8 o'clock.

By the Court:

Q. You said you saw him at 5.40. Was he all right then?
A. 5.40?
Q. Yes. You said you saw him on deck.
A. He showed me his hand because it was bleeding.
Q. Tell us what you saw.
A. Of course his hand was bleeding some and he said, "I hurt my side or some part of it."
Q. Did he show you his side?
A. He raised it up.
Q. What did you see then?
A. I saw a red spot, a little red place.
Q. Did you see any bleeding?
A. I did not.
Q. What else did he say? Just showed it to you?
A. He said, "I have been oiling a long time, but I never did lose a cap before oiling."
Q. What?
A. Lose a cap. He was without his cap. He always wore [fol. 329] a high pressure cap and at this time he didn't, he lost it.
Q. What kind of a cap?
A. A high pressure cap you call it.
Q. What is a high pressure cap?
A. High pressure—h-i-g-h p-r-e-s-s-u-r-e.
Q. High pressure?
A. Yes, that is an engineer's hat.
Q. An engineer's hat you call a high pressure cap?
A. Yes.

By Mr. Potter:

Q. Did you see Mr. Smith the day before this occurrence?
A. Well, he came down. I relieved him every evening at five o'clock for supper. So he comes back and it generally takes about 25 minutes or a little over 25 minutes. It was time to start the 5.30 round, so I said, "Why are you so late, Smitty?" Of course I did kick. That was my time. So he says, "I had a fight with that funny oiler" and so I went on up.
Q. And when did that conversation take place?
A. That took place during that trip anyway.

Mr. Potter: That is all.

Cross-examination.

By Mr. Engelman:

Q. When did you leave the Yankee Arrow, Mr. Hamilton?

A. In August.

Q. Of last year?

A. Yes, 1935.

Q. And since August have you been employed on any vessels of the defendant Socony Vacuum Oil Company?

A. I have.

Q. And when did you last leave one of their ships?

A. March 28th, I believe.

Q. March of 1937?

A. Yes, sir.

[fol. 330] Q. And at what port did you leave that ship?

A. New York.

Q. And what ship was that?

A. Harboro.

Q. Tell us, sir, what you have been doing since March of this year?

A. Why, I have been reporting to the office about three times a week.

Q. In connection with this case?

A. I guess it was, yes.

Q. And you have been on the company payroll?

A. I have.

Q. Although you have not been doing any work all during that time?

A. No.

Q. And you expect to go back to work when this case is over, don't you, sir?

A. Well, I am not particular what company.

Q. Will you go back to work for the Standard Oil Company?

A. I think I will take a freighter.

Q. When were you on a freighter last?

A. About four years ago.

Q. So you now decided that you are going to join a freighter?

A. Yes.

Q. Turning back to June 2nd of 1935, you had a conversation with Smith on that afternoon of that day, is that right?

A. That is right.

Q. At about what time was that?

A. Well, I had a conversation with him a couple of times that day.

Q. A couple of times in the afternoon?

A. No. Yes, a couple of times in the afternoon. I had a conversation with him at five o'clock and then one at 5.30.

Q. At 5 o'clock you relieved him so that he could go up for his dinner?

A. That is right.

Q. Then he came back and took over the job about 5.25?

A. That is right, yes.

[fol. 331] Q. What time did you have your dinner?

A. Well, I had my dinner about 5.30.

Q. About 5.30?

A. Yes.

Q. And it takes you how long to eat your dinner?

A. Well, supper only takes a few minutes because you have tea or something like that. It is pretty hot.

Q. You just have tea?

A. Yes.

Q. At about 5.30, as I understand it, you left the engine room, is that right, sir?

A. Something like that, yes. A few minutes one way or the other.

Q. And you came out on deck at about what part of this ship?

A. I came out on deck right there (indicating on model).

Q. That is on the after side?

A. Yes, sir.

Q. The after-part on the port side?

A. Yes.

Q. And then you went to the mess hall, is that right?

A. When I come out of the engine room?

Q. Yes.

A. Into the mess room is right under here (indicating).

Q. The mess room is on the port side at the after-house?

A. Yes.

Q. Do you remember what you had to eat there?

A. Well, the steward made a big bucket of ice tea that evening,—well, every evening when it is hot, so I generally have that tea in the evening.

Q. How much time did you spend in there?

A. Well, not much time, because it is pretty hot in there.

Q. You had your noonday meal at 12 o'clock, did you?

A. A little after 12.

Q. And you had been working that afternoon?

A. But you have coffee at three o'clock in the evening, coffee and cake, you know.

[fol. 332] Q. You had coffee and cake?

A. At 3 o'clock in the evening.

Q. So that all you had was a little iced tea for dinner?

A. Yes, sir, that is all.

Q. What did you do after that?

A. I went up and I sat right there (indicating on model).

Q. You sat right there?

A. Yes.

Q. You sat on this narrow bit on the starboard side of the after-deck?

A. Yes.

Q. And was anyone else sitting there with you?

A. I was sitting there alone.

Q. You were sitting there alone?

A. Yes.

Q. And then the next thing that happened was that Smith came up and told you he had been hurt, is that right?

A. No, I saw a commotion over here (indicating). I saw him talking to Danny, a little fireman, along here some place.

Q. Near the winch?

A. Yes.

Q. And who else was there outside of yourself and Mr. McKiggan?

A. Well, there was a couple of guys standing over here, I guess (indicating). I don't know who they were. They were sailors.

Q. And Smith was in this crowd and they were all talking together?

A. Smitty was talking to Danny.

Q. And how long did that conversation keep going on?

A. Well, only a few minutes.

Q. And what is the next thing that happened?

A. Well, I seen him walking towards me.

Q. And what did he say to you?

A. He says, "I've been oiling engines a long time, but I never did lose a cap before."

Q. What else did he say to you?

A. He says, "The first assistant says come below and take my place while I go up to get my hand dressed."

[fol. 333] Q. And what did you do then?

A. I proceeded to go to the first assistant in the engine room.

Q. Where did you find him in the engine room?

A. The first assistant was standing by the log desk.

Q. And did the first assistant engineer give you any orders?

A. I asked first if Smitty would be on for his 5.30 round and he said everything was all right for that round.

Q. That is all he said to you?

A. He said, "That oiler got hurt." I said, "Yes, that is what he told me." I said, "Why did he get hurt?" And he took me over and showed me the place Smitty got hurt.

Q. And where did he take you?

A. He took me over to the L. P. journal.

Q. And how long did you remain down in the engine room?

By the Court:

Q. Did you see a step?

A. Yes, I saw a step.

Q. Did you see that step before you were in the engine room?

A. I am bound to see it. It is right in front of it.

Q. What?

A. Yes, sir, it is right in front of me.

Q. And did you see that step plate?

A. Yes.

Q. Was anything under the step plate?

A. No.

Q. Any bracket?

A. No, sir.

Q. No support?

A. No, sir.

Q. Did you ever see the angle iron down there?

A. There is no angle iron down there on that step plate.

Q. Are you sure you never saw any bracket there?

A. Sure. Positive.

[fol. 334] By Mr. Engelman:

Q. How long were you working down there?

A. Well, when I got in the engine room it was a little after 5.30, when I reported to the first assistant, and I stayed there until about 6 o'clock or a few minutes after 6.

Q. And then Smith came down and relieved you?
A. Yes, sir.

* * * * * * *

Q. Is there any telephone communication between the engine room and any other parts of the ship?
A. There is.
Q. There is a telephone communication from the engine room to the oilers' quarters, is there not, sir?
A. No, sir.
Q. Where is the telephone communication from the engine room?
A. To the bridge.

The Court: Have they got telephones or speaking tubes?
The Witness: Speaking tubes and a telephone. The same thing. You communicate through it anyway. You talk [fol. 335] through it.
The Court: Speaking tubes?
The Witness: Speaking tubes and telephone.

Q. To the bridge?
A. Yes, only to the bridge.

The Court: Only to the bridge?
The Witness: Only to the bridge.

Q. And there is always someone on the bridge, isn't there?
A. Yes.
Q. There are always sailors on deck, are there not?
A. Well, that is hard to tell.

The Court: There are always sailors on deck?
Mr. Engelman: Yes.
The Court: "Always" is a long time.

Q. Have you ever sailed as an able-bodied seaman or an ordinary seaman?
A. I have.
Q. They have a series of watches, don't they, just as they do in the engine room?
A. They do.
Q. There are always men on deck?
A. Yes.

Q. That is true, is it not, sir?
A. That is true, yes.

Mr. Engelman: No further questions.
Mr. Potter: That is all, Mr. Hamilton. Will you please step down?

[fol. 336] Robert L. Turner, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Potter:

Q. Mr. Turner, what is your occupation?
A. I am a first assistant engineer, sir.
Q. How long have you been going to sea?
A. Since about September, 1916.
Q. Do you hold any certificates at the present time?
A. Chief engineer's certificate for any vessel of any tonnage in steam.
Q. After first going to sea in 1916 did you serve through the various grades until you obtained your certificate?
A. Yes, sir.
Q. On what sort of ships or vessels did you sail on?
A. I have sailed on passenger ships, oil tankers, and freighters.
Q. Since first going to sea in 1916 have you been continuously employed aboardship?
A. With the exception of a couple of months at different times.
Q. Do you know the S. S. Yankee Arrow?
A. Yes, sir.
Q. Did you serve on the S. S. Yankee Arrow on a voyage commencing at Baltimore on May 28th?
A. Yes, sir.
Q. And in what capacity did you serve on this voyage which commenced on May 28th, 1935?
A. As first assistant engineer.
Q. Where was the S. S. Yankee Arrow bound for when she sailed from Baltimore?
A. She was bound for Beaumont, Texas.
Q. And did you continue with the ship until she arrived at Beaumont?
A. Yes, sir.

[fol. 337] Q. Are you able to recall at this time without your log what your watch was on this voyage?

A. 4 to 8 watch.

Q. And did you stand all your watches on this voyage?

A. Yes, sir.

Q. Do you know a man named Herbert Smith?

A. Yes, sir.

Q. Was he attached to the S.S. Yankee Arrow on this voyage to which you have referred?

A. Yes, as an oiler.

Q. Did you see him on that voyage?

A. Yes, sir, I saw him every day on my watch.

Q. Prior to the voyage did Mr. Smith ever tell you at the Erie Basin that a bracket underneath the step plate in the engine room was loose?

A. No, sir, he did not.

Q. Did he ever tell you at Erie Basin that a bracket underneath the step plate was out of place?

A. No, sir.

Q. Did Mr. Smith ever tell you at any time and on any occasion that a bracket below the step plate in the engine room of the S.S. Yankee Arrow was broken?

A. He did not.

Q. Or loose?

A. No, sir.

Q. Or out of place?

A. No, sir.

Q. I direct your attention to a photograph which has been marked Plaintiff's Exhibit No. 1 and direct your attention to the figure 1 on the step plate shown in that photograph. At any time when you served on the S.S. Yankee Arrow was there ever a bracket beneath that step plate shown in that photograph (handing to witness)?

A. No, sir, there was not.

Q. Was there ever a strut beneath it?

A. No.

Q. Was there ever any support below it?

A. No support below the plate whatever.

[fol. 338] Q. Now, I show you a photograph which has been marked Plaintiff's Exhibit No. 2 and ask you if a step plate shown in that photograph is the same step plate as that indicated in the photograph which has been marked Plaintiff's Exhibit 1?

A. Yes, that is the same plate.

Q. Will the testimony you have given regarding the bracket apply also to that step plate shown in Plaintiff's Exhibit No. 2?

A. Yes, sir.

Q. Directing your attention to the afternoon of June 2nd, 1935, did you stand your watch on that afternoon?

A. Yes, sir.

Q. Were you in the engine room on that afternoon about 5:30 of that day?

A. Yes, sir, I was there at 5:30.

Q. Were you standing at that time near the floor plate which is shown in the two photographs which have been marked Plaintiff's Exhibits 1 and 2?

Mr. Engelman: I have not objected so far, but all these questions, your Honor, are, if not leading, they are at least highly suggestive.

The Court: I will ask him a few questions.

By the Court:

Q. When you stood your watch from 4 to 8 on June 2nd in the engine room did you see the plaintiff Smith?

A. Yes, sir.

Q. What did you see him do?

A. Well, going around his usual routine of oiling the engine and the auxiliaries.

[fol. 339] Q. The engine?

A. Yes.

Q. Did you ever on this journey or any other journey on the Yankee Arrow see Smith feel any bearings?

A. Yes, sir. It is a custom to feel the bearings every half hour.

Q. I didn't ask you that. Did you ever see him feel the bearings?

A. Yes, sir.

Q. Did you ever see him feel the bearings of the L. P. journal?

A. Yes.

Q. Tell the jury how he felt those bearings, how you saw him feel them.

A. Sir?

Q. How you saw him feel the bearings. Tell them and tell them the truth, what you saw him do when he felt that bearing.

Mr. Potter: You are referring to previous occasions?

The Court: On any occasion when he saw the way in which he did it.

A. Well, as a rule when I get an oiler on the ship he shows me discharges.

Q. I didn't ask you. Don't become confused, Turner.

A. Your Honor, I can't remember exactly how each man feels a bearing.

Q. Do you remember now seeing Smith feel the bearing?

A. I beg your pardon?

Q. Do you remember whether you ever saw him, the plaintiff Smith, feel bearings?

A. Yes.

Q. Do you remember seeing him feel the L. P. bearing?

A. Yes.

Q. Do you remember now seeing him do that?

A. Well, yes, sir. I am bound to see him.

Q. Don't say you remember if you don't. Do you remember seeing Smith feeling the L. P. journal?

A. Yes, sir.

[fol. 340] Q. Did he always feel it the same way?

A. I can't recollect——

Q. I am only asking you about him.

A. I can't recall the exact manner in which he felt the bearing.

Q. Do different oilers feel it different ways?

A. Some men might have their hand in one spot——

Q. I am not asking you what they might do. You are in the engine room, aren't you?

A. Yes, sir.

Q. You have seen many men, haven't you, feel that L. P. bearing?

A. Yes, sir.

Q. On the Yankee Arrow?

A. Yes, sir.

Q. Do they all feel it the same way?

A. No, sir, they do not.

Q. Tell the jury the different ways in which they feel the bearings.

A. Shall I point it out on this?

Q. Yes, if you want to.

A. Sometimes a man might support himself——

Mr. Engelman: Suppose you step down here.

Mr. Potter: Excuse me, Mr. Engelman.

Mr. Engelman: I would just like to be of a little assistance.

Mr. Potter: I would very much prefer you occupy your chair and not direct my witness.

Mr. Engelman: May I stand right near the witness?

Mr. Potter: You can stand right behind the witness, if you desire.

The Court: Don't get in his way. The question is not where you are standing, but where Smith stood at the time.

[fol. 341] The Witness: The way I direct men to feel the bearings.

Q. Do you recommend the men?

A. If I see a man feeling the bearing in an improper manner I correct him.

Q. Mr. Turner, take it easy, nobody wants to confuse you. The jury wants to be informed and the Court does also. The question asked you now is—you said different men feel the bearings in different ways.

A. Yes.

Q. Now, tell the jury the different ways in which you saw men feel the bearings. Give us the facts.

A. I have seen men on some occasions take hold of this guard here and reach down to feel the bearing (illustrating), but as a rule they always take a hold of this guard rail there (indicating).

Q. You have seen some men, when feeling the bearing, take hold of the guard rail?

A. Yes, sir.

Q. You have seen some do it without that?

A. Yes, sir, but holding on to this crank pit guard there (indicating).

Q. What?

A. This guard, the top of this guard by the crank pit.

Q. And when they held on there they would not take hold of the guard rail, is that it?

A. Yes, sir.

Q. Did you ever see any of them going on the step plate?

A. No, sir.

Q. You have never seen anybody go on the step plate?

A. No, sir, not while the engine was moving.

Q. You have never seen that done?

A. No, sir.

[fol. 342] Q. Were you there when Smith met with his accident?

A. Yes, sir.

Q. Did you see him at the time?

A. I didn't see him when he slipped, but I saw him going down and assisted him to his feet.

Q. Do you know whether immediately after you saw him he was on the step plate or not?

A. No, sir.

Q. You don't know?

A. No.

Q. He may have been or may not have been?

A. Yes, sir.

By Mr. Potter:

Q. Where was he when you saw him, Mr. Turner?

A. He was flat on the floor with his body partly in that eccentric pit and the rest of his body on the floor plate with his feet towards the ship's side.

Q. On his belly or on his back?

A. He was on his stomach.

Q. When you observed Mr. Smith on the floor plate what did you do?

A. I assisted him to his feet.

Q. When you assisted him to his feet was he covered with blood?

A. The only blood I saw was on his hand. He had a slight cut on his finger.

Q. After you assisted him to his feet did he faint away or become unconscious?

A. No, sir, he certainly did not.

Q. After you assisted him did he remain in the engine room or did he go up above to the deck?

A. I sent him to the deck.

Q. Did anyone assist him going up to the deck?

A. He went up alone.

Q. Shortly thereafter did he return to the engine room?

[fol. 343] A. Yes, sir. I would say in 20 minutes or so.

Q. What did he do when he returned?

A. I asked him if he was able to take the watch and he said, "Yes, I am all right."

Q. And did he take the watch?

A. He finished that watch.

Mr. Potter: That is all.

Cross-examination.

By Mr. Engelman:

Q. I understood you to testify, Mr. Turner, that you didn't see Smith fall, is that right, sir?

A. I didn't see him fall, no.

Q. But when you arrived there, I understood you to testify, part of his body was in the eccentric pit?

A. That is what I call it, yes.

Q. And the eccentric pit is in front of the letter L on Plaintiff's Exhibit 2?

A. Yes, sir.

Q. And you helped him out of there, did you not, sir?

A. Yes, sir.

Q. You had seen Smith oiling before, had you not, sir?

A. I had.

Q. And you never gave him any instructions?

A. I did not.

Q. But I believe you testified on direct examination that different oilers did this job of feeling the L.P. journal in different ways?

A. There is no two men working in an engine room doing the work in exactly the same manner.

Q. When you see them doing it the wrong way, I believe you testified, then you tell them what the right way is?

A. Yes.

* * * * * * *

[fol. 344] Q. May I assume, sir, from the fact that it is your practice to correct oilers who do a job in the wrong way and that you have testified that you have never corrected Smith, although you saw him doing these jobs, that therefore what you saw him do he was doing in a correct manner, is that right, sir?

A. I should say so.

Q. You are still employed by this defendant corporation, are you, sir?

A. Yes, sir.

Q. And might I ask you what your salary is?

A. $220 a month.

Q. And you left one of the vessels of this defendant corporation when?

A. I think it was the 29th of April or the 30th.

Q. And since that time you have been on the payroll [fol. 345] standing by here, have you, sir?

A. Yes, sir.

Q. Tell the Court and jury how you saw Smith feeling of this No. 4 L.P. journal.

A. I did not see him feeling it at that time.

Q. Did you ever see him feeling it at any time?

A. Yes, sir.

Q. Do you recall how he did the job?

A. He had his hand on that guard for that crank pit there (indicating) and reached over and felt the bearing.

Q. I direct your attention to this Plaintiff's Exhibit No. 1. Can you indicate there where he put his hand to feel the bearing?

A. He would hold on to this guard here (indicating).

Q. With what hand, sir?

A. With his right hand.

Q. When you say "guard" do you mean the hand-rail G or do you mean this guard (indicating)?

A. When I saw him he had hold of this hand-rail G, guard or hand-rail.

Q. And with what hand, sir?

A. With his right hand.

Q. And what would he do with his left hand?

A. He would reach down here (indicating) and feel this main journal.

Q. At this point designated S?

A. About there, yes.

The Court: Where would his feet be?

The Witness: His feet would be on this floor plate (indicating).

The Court: Not on the floor, on the step plate?

The Witness: Both feet would be on this floor plate, sir.

[fol. 346] The Court: Did you ever see him touch a bearing while his feet were on the step plate?

The Witness: No, I have not, sir.

Q. I would like you to direct your attention to what is above that step plate which is not disclosed by that photograph: What have you got overhead, directly up in a line?

A. Well, how high up?

Q. I mean right up to the top of the engine room.

A. Well, you have got a grating above as far as the top

there of your engine, what we call the top there, the crossheads, guides, slippers, and so forth, valve and gear.

Q. They are about 15 or 20 feet above that step plate, are they?

A. No.

Q. How high up?

A. I would say about 7 feet.

Q. About 7 feet from the step plate?

A. Not over that. I can stand on the step plate and reach the grating above my head.

Q. Do you recall what time this accident happened, Mr. Turner?

A. It was around 5.30 in the afternoon watch.

Q. And did Smith leave the engine room immediately or did he stay there for a few minutes sort of reviving himself?

A. He had left the engine room immediately. I told him to go up and have his fingers dressed.

Q. And that was all you did tell him?

A. That was all I told him.

Q. Just simply to go up and have his fingers dressed?

A. I told him to go to the captain to have his fingers dressed.

[fol. 347] By the Court:

Q. Did you speak to him at all?

A. I just asked him if he was hurt, like I would say to anybody that fell.

Q. What did he say?

A. Well, I don't recall, your Honor.

Q. You don't recall?

A. No, sir.

Q. You don't recall whether he spoke to you about the back?

A. No, sir. He showed me his side.

Q. He did?

A. Yes, sir.

Q. Did he take off his clothes, raise his clothes to show you?

A. Yes, sir. I believe he raised his undershirt.

Q. And what did he say?

A. I saw it looked like it had been scraped against something. It was turning red at that time.

Q. It was turning red at that time?
A. Yes, sir.

By Mr. Engelman:

Q. Directing your attention to that photograph, Plaintiff's Exhibit 1, Mr. Turner, would you tell me, please, what the step plate marked with the figure 1 is there for?
A. Well, it is there in overhauling the engine when we are in port, while the engines are idle. They are also used for wiping down and so forth.
Q. It is not used then for reaching over and feeling the bearing?
A. That is not what it is there for. It is not used for that purpose.

By the Court:

Q. What was under the floor plate?
A. You mean under this step plate (indicating)?
[fol. 348] Q. The step plate.
A. Well, there is nothing under there except the base of the engine coming down. It comes down at an angle like that (indicating).
Q. Is there any bracket there?
A. No, sir.
Q. You are sure there is not?
A. Yes, sir.
Q. Did you see the angle iron?
A. There is a clip there securing that guard to the base of the engine.
Q. Did you see it the day of the accident? Was that out of place the day of the accident?
A. No, sir. That is this small clip there that I referred to (indicating).
Q. What is the size of that clip?
A. Well, it is about two inches long. That is, it is a 90-degree angle.
Q. Does it reach from the floor or from where it was holding the guard up to the level of the step plate? Do you know?
A. Up to the step plate, no, sir. It is only about two inches long.
Q. In its longest dimension it is 2 inches?

A. Yes, sir.

Q. What if it got loose in the place it is, could it possibly——

A. A man couldn't possibly step on it, not in that position.

By Mr. Engelman:

Q. I direct your attention to this object in Plaintiff's Exhibit No. 2 (indicating). Will you tell me what that is, sir?

A. We call it the crank web.

Q. Has an oiler anything to do with that crank web?

A. He has to feel it. You don't have to feel the web. He has to feel the bearing inside of the web.

[fol. 349] Q. Will you please put the letter W on that web, please?

A. (Witness marks.)

Q. Where is this bearing that he has to feel inside of it?

A. It is marked there with the letter S. You mean on the crank?

Q. On the crank, sir.

A. There is your connecting rod here (indicating). That connects with the crank pit.

Q. Where would he put his hand to feel the bearing?

A. Put it between the web and the bearing.

Q. Will you indicate that on the photograph. Can you do that better in here (handing paper)?

A. No. The crank is on the bottom there (indicating). There is a slight space in here where a man can thrust his hand in there when the engine revolves. He would feel that bearing to see whether it is hot or not.

Q. When it is at the top, as shown in the photograph?

A. You catch it as it comes over the top.

Mr. Potter: May we have it appear which photograph the engineer has marked?

Mr. Engelman: Plaintiff's Exhibit No. 2, Mr. Potter.

Mr. Potter: Thank you, sir.

Q. Would you put a T there where he would feel of it, sir?

A. That is a very poor photograph for that purpose. You cannot distinguish between the web and the brass.

Q. Approximately.

A. He would catch it along here (indicating).

Q. Would you mind putting a T there, if you please?

A. (Witness marks.)

Q. At this particular point where you placed the letter T [fol. 350] is it possible for an oiler to feel up in there the bearing of the web without standing on the step plate?

A. Certainly.

By the Court:

Q. Can you reach it and feel it?

A. Yes, sir.

Q. With both feet on the floor?

A. Yes, sir.

Q. Could you feel it better if you stood on the foot plate?

A. It would be very dangerous to stand on that foot plate and try to feel that bearing.

Q. It would be easier?

A. No, sir, I cannot say that it would be any easier. I never did try it myself.

By Mr. Engelman:

Q. Will you tell me, sir, why it would be difficult for a man to stand on the step plate and feel the bearing?

A. Because he would be up too high over the crank.

Q. You never at any time gave any course of instruction to oilers as to how they are to do that job, did you, sir? I believe you testified each man had his own way to do it.

A. Well, there is a right and a wrong way. I don't say everybody does it the same, but they all do what I would call right anyhow.

Q. They all do what you would call right?

A. Yes.

Q. But you never give any course of instruction aboard the ship as to how that work was to be done?

A. I am not supposed to. That is not part of my duty.

Q. I didn't ask you. Did you?

A. I did not.

[fol. 351] Q. Did the chief engineer, to your knowledge?

A. He did not.

Q. Did the second or third engineer?
A. Not to my knowledge.

Mr. Engelman: No further questions.
Mr. Potter: That is all, Mr. Turner. Will you step down, please.
Now, Mr. Stanley, will you take the stand.

THOMAS LAURENCE STANLEY, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Potter:

Q. Mr. Stanley, what is your business?
A. Consulting engineer and marine surveyor.
Q. For how long have you been engaged in your business of building and repairing?
A. I have been engaged in the building and repairing and surveying and operation of marine engines and boilers for over 30 years.
Q. Tell us, if you will, please, what experience you have had in this profession.
A. After leaving school I served six years' apprenticeship on the building and installation of marine engines and boilers, after which I went to sea for approximately six years as third, second and chief engineer, after which I was a foreman in the Robins Dry Dock for approximately [fol. 352] 12 months on the repairing of these marine engines. After that I was chief surveyor for the Naval Construction Company in Quebec, Canada, for about a year, following which I came back to the Submarine Boat Corporation at Port Newark, as superintendent engineer of the building of 150 ships at that yard, after which I was superintendent engineer for the Transmarine Lines in charge of all repairs and operating of the engineering department for about four and a half years and then I went into business for myself in 1926 and I have been at that ever since as consulting engineer and marine surveyor.
Q. Have you been to sea yourself?
A. For about six years.
Q. And in what capacity did you then serve?

A. Chief, second and third.

Q. As a matter of fact, do you hold any certificates at the present time?

A. I hold American unlimited chief engineer's license for steam, Diesel and electric-drive and unlimited British chief engineer's license.

Q. Are you a member of any marine society at the present time?

A. A member of the Society of Naval Architects and Marine Engineers of America.

Q. Mr. Stanley, did you ever at my request make an examination of the engine room of the S. S. Yankee Arrow?

A. I did. I think it was on April 30th of this year.

Q. And where was the Yankee Arrow on that occasion?

A. Lying at anchor off Stapleton.

Q. Who was present at the time you made this survey or examination?

A. You and the first assistant engineer and myself.

[fol. 353] Q. Mr. Turner, the witness who has just preceded you?

A. Yes.

Q. And on that occasion did you examine the engine room of the S. S. Yankee Arrow?

A. I did.

Q. I show you a photograph and ask you if that fairly represents the conditions which you found on that occasion?

A. Yes. This represents the front of the engines at the L. P. column.

Mr. Potter: May I have this photograph marked for identification. Later I will offer it.

Mr. Engelman: May I see it? I may consent to your offering it now.

Mr. Potter: It is a duplicate of the one you have. I thought it would be less confusing than to use one of those you had used.

Mr. Engelman: You can offer it in evidence and I will stipulate that the one I have is one which you gave me in lieu of an examination by me aboard the ship.

Mr. Potter: It is stipulated that the photograph now shown to the witness on the stand is a duplicate of Plaintiff's Exhibit No. 2 which was supplied by the defendant to the plaintiff's attorney.

Mr. Engelman: That is correct.

Mr. Potter: Now, I offer it in evidence.

(Marked Defendant's Exhibit J.)

Q. Mr. Stanley, will you please step down so that you may show to the jury the paper which we now hand you which is known as Defendant's Exhibit J.

A. (Witness complies.)

[fol. 354] Q. Now, I direct your attention to Defendant's Exhibit J. Does that show the part of the front of the engines of the vessel S. S. Yankee Arrow?

A. Yes, it does.

Q. Now, I direct your attention to the figure 1 which appears on that photograph. Do you observe the figure 1?

A. I do.

Q. Tell us, if you will, please, what that is.

A. That is one of the columns which stretch from the bed plate to the cylinders and support the cylinders at the top of the engines where the power is developed or generated for turning the crankshaft.

Q. What is the part which is marked 2 in the photograph which you hold in your hand?

A. The part marked 2 is part of the bed plate. This particular bed plate is what is called a bridge bed plate and the plate marked 2 is the part that supports the bearing and casing, this particular part of the crankshaft (indicating). The bearing is the whole box which fits into the bed plate itself. The bed plate stretches the full length of the engines but this bearing is fitting to that part of them, one on each side of each crank (indicating).

Q. What is the function of the bed plate?

A. The function of the bed plate, which is always made of cast iron, is to provide a rigid body into which the bearings can be fitted very closely so there will be no shuffling or movement and no motion whatsoever in providing a rigid base by means of the bearing for supporting the crankshaft.

Q. Mr. Stanley, will you tell us the complete cycle of how this machine works?

[fol. 355] A. First the water is put in the boilers and turned into steam by the application of heat. The steam is then allowed to pass through the steampipes from the boilers to the high pressure steam chest and the valves which are operated, the high pressure valve is operated by what we call an eccentric rod which is shown here in this particular

photograph, there is one for ahead and one for astern (indicating), that permits the steam into the high pressure cylinder where it operates on the piston. From there it goes to the first intermediate and does the same thing and from there it goes to the second intermediate and does the same thing, from there it goes to the low pressure cylinder and does the same thing and then it is exhausted into the condenser where the steam is projected on to copper tubes through which there is salt water passed and that turns it back into water and then it runs down into the hot well tank from where it is picked up by the said pumps and passed through the said water heater which brings it back up to a high temperature again before being put into the boilers, thereby completing the cycle.

Q. Now, I direct your attention to the figure 3 on the photograph and ask you to tell us, if you will, please, what that is.

A. That is a grab-rail or hand-rail which is placed on each side of each column so that if the vessel is rolling the men can hang on to that whilst they are feeling the bearings or oiling them.

Q. Are you able to tell us the distance from the grab-rail which is illustrated there to the center of the bearing shown in this photograph?

A. Yes. The distance from this grab-rail to the top center [fol. 356] of this bearing is 51 inches, but to this center on the nearer side it is 7½ inches less because the shaft is 15 inches in diameter (indicating).

Q. And about how tall are you?

A. 5 foot 6.

Q. Have you ever taken hold of the grab-rail shown in that photograph?

A. I have taken hold of the rail on that Yankee Arrow and felt that bearing myself.

Q. And where were your feet at the time you did so?

A. Both on the floor plate, right here (indicating).

Q. And as you felt the bearing was it necessary for you to stand upon the step plate shown in that photograph?

Mr. Engelman: I object to that as argumentative. He has already testified.

The Court: I will sustain the objection.

Mr. Potter: Exception.

Q. On that occasion did you use the step plate shown in that photograph?

A. I did not. I stood on the floor plate.

Q. I direct your attention to a step plate shown in that photograph. Tell us if you will, please, what is the purpose of that step plate.

The Court: What is the number, do you know? Is it No. 4?

Q. Is the step plate numbered in your photograph?

A. No. 4.

Q. Directing your attention to No. 4, tell us, if you will, please, what is the purpose of that step plate?

A. The step plate is for use of the men in the engine room [fol. 357] when the vessel is in port to get up on top of this bed plate key, as it is called, this slab of steel which holds the bearing in place, so that they can get up there to clean or repair or whatever they may be sent to do.

By the Court:

Q. How is that step plate made fast?

A. It is made fast here (indicating). It is offset. The bed plate bridge here (indicating), through it is an anchor and this checker plate is ⅜ths material and then it is offset here with a lip laid against that angle of the bridge of the bed plate itself, and then fastened with two ⅝ths top bolts.

Q. Is there any other means of fastening it?

A. That is the only means I ever saw of fastening those.

Mr. Engelman: I object to that. I object to the answer as not responsive. The witness is testifying to what he saw. He was not asked that.

Q. Did you see any other means of fastening that?

A. There is absolutely no other means of fastening that plate on that vessel.

Q. Did you at any time ever see any brackets?

A. No, sir, and I also saw that there was no hole in the top of that plate to which a bracket could be fastened.

Mr. Engelman: I ask that that be stricken out as not responsive.

[fol. 358] The Court: Read the question.

(Question read.)

Q. Yes or no?

A. No.

The Court: Your motion is granted. The answer is no.

Q. Did you see any angles——

A. That is a clip, your Honor. It is made out of angle iron.

Q. Did you see an angle iron underneath?

A. Yes, sir.

Q. What does that do?

A. That is for the purpose of securing this guard plate——

Q. No. 6?

A. No. 6, to the bed plate. There are four angle clips, as they are called. There is one there and one there (indicating), those two fastening into bed plates and these two fastening into that column (indicating).

By Mr. Potter:

Q. What are the step plates made of, Mr. Stanley?

A. Steel checker plates.

Q. At the time you observed it was there any hole in the step?

A. There were two holes by which it was secured to the bed plate, and that was all.

Q. Was there any evidence of any brackets ever having been beneath that step plate?

A. None whatever.

Q. Now, does the photograph show——

By the Court:

Q. Do you know the dimensions of that angle iron?

A. It is an angle iron clip. It is approximately 2 inches long and 1¼ or 1½ this way and that way (indicating). In other words, it is 1¼ or 1½, cut off 2 inches long.

[fol. 359] Q. Can you tell the jury how far from the bottom of the step plate it is?

A. Well, that step plate is actually about 12 inches above that floor plate, and this is less than half of that; about 8 inches below that step plate. This here is a foot (indicating) on each of those ladders, and this here (indicating) is slightly or approximately on the same level as that. This is less than half way (indicating) as can be seen.

Q. How far is the step plate from the floor?
A. About a foot.
Q. How long?
A. About a foot; 10 inches or a foot; not less than 10 inches.

By Mr. Potter:

Q. Now, have you figure 5 on the photograph which you have before you?
A. Yes, sir. That is a guard plate at the eccentric.
Q. Approximately what is the height of this guard plate?
A. About 3 feet 6 from the floor plate to the top of this guard plate over here (indicating).
Q. It has been testified here by the plaintiff that just before he fell he had his right foot on the step plate and his left foot on the bed plate and his left hand on the top of the guard and was feeling the bearing with his right hand: Is that in your opinion a proper and usual way to feel that bearing?

Mr. Engelman: I object to the question.
The Court: Objection sustained.

By the Court:

Q. How far is it from the shaft or the bearing of the shaft to the floor?
A. From here to here (indicating)?
[fol. 360] Q. Yes, to the nearest part of the floor.
A. Oh, I would say somewhere about 2 feet from the shaft to a line up with that floor.
Q. You say that the difference the nearest part of the floor and the shaft is 2 feet?
A. Approximately 2 feet.
Q. How far is it to the bearing, to the housing of the bearing?
A. The housing is nearer than the shaft.
Q. 10 inches?
A. Oh, a couple of inches less.

By Mr. Potter:

Q. Directing your attention to the figure 6 on the photograph which you hold in your hand: What is that?
A. That is the guard plate for the low pressure crankcase.

Q. Have those guard plates something around the top edge?

A. They are fitted with half round iron, as this photograph shows. Well, it strengthens the plate in the first place and secondly it provides a form of handrail so you won't cut your hands if you are hanging on to that guard plate, as would happen if you just had a straight piece.

Q. Is it possible to stand with your left hand holding this guard plate, grasping it with the left hand and feeling the bearing with your right hand when standing with both feet on the floor plate?

Mr. Engelman: I object to that unless we have some testimony that he actually did that.

Mr. Potter: I am trying to have the witness explain what the situation there was. Was the machinery as it there existed?

The Court: I sustain the objection.

[fol. 361] Q. Is it possible to stand with both feet on the floor plate grasping the grab or hand rail with your right hand and feeling the bearing with your left hand while both feet remain on the floor plate?

Mr. Engelman: I object to that.

The Court: I will sustain the objection.

By the Court:

Q. How far is it from the nearest point of the floor plate to the grab iron?

A. Approximately 2 feet 1. It is 51 inches from there (indicating) to the center of that bearing. Now, you have 7½ inches that you are nearer than that if you feel this side of the bearing, because that is the diameter of the shaft—it is 15 inches. From here to that grab rail to this side of that rail—bearing is 51 less 7½ inches, or 43½ inches.

Q. If a man is 5 feet 6 inches tall and he is standing on that step plate, how far would he have to reach? What would be the distance from 5 feet 6 inches above the plate to the bearing or the shaft?

A. From 5 feet 6 inches above the bearing?

Q. How far would he have to reach to get the bearing?

A. From this (indicating)?

Q. No (indicating). 2 feet?

A. About 2 feet further, yes.

Q. If a man is 5 feet 6 inches high how would he take hold of the grab rail?

A. Just on the side. The way they do is to take hold, lean over (indicating).

Q. How far would he have to reach if he is 5 feet 6 inches high to get to the bearing?

A. 51 inches less 7½; about 43½ inches.

[fol. 362] The Court: Go ahead.

Mr. Potter: You may inquire.

Cross-examination.

By Mr. Engelman:

Q. Were these photographs taken when you made your examination, Mr. Stanley?

A. I am almost sure they were taken before I was on board. At least, I will say this: I did not see any photographs taken.

Q. When you were aboard there what equipment did you have with you?

A. None whatever.

Q. None at all?

A. I had a rule with me. I always have a rule with me.

Q. Have you the rule here?

A. I have a 12-inch rule here, but the rule I used had been there. I got it from the chief first assistant engineer.

Q. You haven't the rule with you that you used to make these measurements?

A. No, sir, I have not.

Mr. Potter: I have a rule here if you want one.

Mr. Engelman: No, I wanted to see the type of rule it was.

The Witness: That is the type of rule it was (indicating).

Q. That is the type of rule (indicating)?

A. Yes.

Q. Have you seen the plans of this ship, Mr. Stanley?

A. I don't think I have, no.

Q. Was this your first trip aboard the Yankee Arrow?

A. To the best of my knowledge, yes.

Q. Have you acted as consulting engineer or as expert [fol. 363] for the Socony Vacuum Oil Company at any time?

A. Once in my life before this time.

Q. This was your second job for them?

A. Yes.

Q. How long ago was the other job?

A. Oh, I don't know whether that is a year or eighteen months; somewhere in that vicinity.

Q. It is how long since you have been to sea as an engineer yourself?

A. Well, actually signed on the articles, it is quite a while, but it is not so long that I have been aboardship actually operating the engines as an engineer. That is part of our job as consulting engineers, to see the operation of the engines after any breakdown.

Q. I direct your attention to the Defendant's Exhibit J, does the L. P. bearing extend from the point at which appears the figure 8 right straight over in a right direction the way I am drawing my pencil to this point where my pencil is now stopped.

A. Further than that.

Q. About here (indicating)?

A. Yes.

Q. Would you get your fountain pen and draw that out for me, please?

A. About there (indicating).

Q. Now, at the point where the figure 8 appears there is a casing or covering over the bearing, is that right?

A. No, sir.

Q. That is the naked bearing there?

A. That is the naked bearing. This is the lip at the end of the bearing that you see with the figure 8 over it. That has the same extension over the flat of the bearing on this other side which of course, is not visible in this photograph.

[fol. 364] Q. But at the point where the figure 8 appears the bearing is there free?

A. I don't understand what you mean by free. It is not free, no.

Q. It is free in the sense that it is not in contact with anything?

A. You feel the bearing right there (indicating), and it is not free.

The Court: Show me the shaft in the picture.

The Witness: This is the shaft, your Honor (indicating). From there to there, and that from there to there is the bearing.

Q. Would you draw a dotted line on the shaft from the figure 8 right over to the edge of the slush pan, No. 5?

A. That is the end of the shaft.

Q. What do you call this where the figure 2 appears?

A. That is part of the bed plate.

Q. So that the bearing continues inside of the bed plate?

A. That is right—well, it is hardly inside the bed plate because the bed plate stops right there (indicating) and this is just a slot.

Q. It is on top of it?

A. No, it is not on top of it. The bed plate runs all the way underneath it and around the back of it, and this is fit into a slot in the bed plate. There is the bottom half finished there (indicating), and this is the top part. That is a solid block, but this rests on top of it like a strongback. These bolts go through the bed plate. There is another one behind the same as this, that keeps these two halves of the bearing absolutely rigid and solid. There is nothing free about it. The shaft is running free of that bearing, but the [fol. 365] bearing itself must be absolutely rigid or else you would have a breakdown.

Q. And the bearing must be lubricated?

A. Certainly.

Q. Now, I direct your attention to Plaintiff's Exhibit No. 1, and I direct your attention in particular to the figure 3 and ask you if you had occasion to examine that part of the ship when you went aboard and made your inspection?

A. More or less generally.

Q. Did you have occasion to put your hand down in that hole there?

A. No.

Q. So that you made no measurement from the figure 3 over to G where the grab rail appears?

A. No, I know what it is.

Q. What is it?

A. The same as this figure I gave you, 51 inches to the center of it. That is always in the center of the keep and that center of the keep is the same measurement I gave you. That is as surely 51 inches to that grab rail as I am sitting in this chair.

Q. I believe you testified it was 51 inches from the grab rail designated 3 in the Defendant's Exhibit J over to the point designated 8 in Defendant's Exhibit J.

A. No, I didn't. I testified that it went from the part marked 3, the grab rail to the top center of that bearing, and immediately below the point you have shown me on the other photograph on the bed plate.

Q. Will you place an O at the particular point you made the measurements to the 3 at the top of the bearing?

A. You can't get this only approximate because the angle of your photograph is entirely wrong to show you that. It is approximately there (indicating).

[fol. 366] Q. That was 53 inches?

A. 51 inches.

Q. So, you therefore arrived at the conclusion that it is also 51 inches from the hand rail G on Plaintiff's Exhibit No. 1 to the point designated 3 on Plaintiff's Exhibit No. 1?

A. Yes, as near as possible; within a half an inch.

Q. Now, down in this hole where the figure 3 appears, if you were to place your hand down in there you would be feeling the bearing, would you not?

A. If you were foolish enough to put your hand in.

Q. If you were foolish enough to put your hand in?

A. Yes.

Q. Why do you say that?

A. Because I never put my hand in there.

Q. Why not, sir?

A. For the same reason that I can get exactly the same by feeling the end of the bearing and I won't take any chance on having my finger ends taken off.

The Court: Are there moving parts there?

The Witness: The shaft is running in there, your Honor. I want to see where my fingers are going.

Q. Why did they have that hole there?

A. So you can put in an extraordinary amount of oil in an effort to bring back your bearing should it get away from you.

Q. How can you determine whether or not that particular part needs an extraordinary amount of oil?

A. By the feel of your fingertips on the end of the bearing, right where I put the letter 8.

[fol. 367] Q. Where you put the letter S?

A. No, I think it is 8.

Q. Where you put the figure 8?

A. Yes.

Q. Now, I direct your attention to Defendant's Exhibit J and I refer to this clip beneath No. 4 which you have designated as the step plate and the part of that clip that is affixed not to the part designated 6, but to this where I have my pencil: What is that?

A. That is the bed plate.

Q. Bed plate?

A. Yes.

Q. Do you see in the center of that a sort of opening? Sort of a hole there?

A. No. I see a mark there, but I don't know what it is; it doesn't look like a hole to me.

Q. Did you examine that clip at the time you made the inspection?

A. I saw that clip, yes.

Q. Did you see a hole there at that time?

A. No, sir. I saw a flat-head screw that is put in with a screwdriver.

Q. A flat-head screw?

A. Yes.

Q. Do you see that screw on the photograph?

A. You couldn't see that on any photograph.

Q. I didn't ask you that. I asked you——

A. I saw something. I don't know what it is. I have told you I don't know what it is.

Q. Well, I direct your attention to the other part of the clip and there appears to be something protruding out there and also the upper one, both at the top and at the bottom there appears to be a bolt there.

A. Yes, a bolt-head; tap bolt-head.

Q. Tap bolt-head?

A. Tap bolt-head; t-a-p.

Q. But on the bottom part of this clip was there not a tap bolt-head; there was just a screw?

[fol. 368] A. I wouldn't expect a tap bolt there; I would expect a screw there; a flat-head screw.

Q. Why would you expect a flat-head screw on the clip beneath the step plate, where on the clip on top of the step plate you have a bolt?

A. That is presumably because down here if you want to tighten up that tap bolt you are going to get your wrench up against the bottom of that column there, and it is much easier to put it in with a screwdriver and a monkey wrench on the screwdriver.

Q. Now, don't you run into the same situation on this clip?

A. No. You have plenty of clearance there.

Q. I am referring to this clip on top of the step plate.

A. I know.

Q. In other words, you mean to tell us that you can put a bolt in there?

A. Yes.

Q. But you can't do it at the bottom?

A. It is not so easy to do it. It is much easier to put in a flat screw.

Q. What kind of screw was that?

A. It is a screw—what we call a countersunk with a slot in the top to put a screwdriver in and a monkey wrench on it and twist it in.

Q. As a matter of fact, Mr. Stanley, did you actually examine that screw in detail?

A. I can see by the top of it what it is.

Q. I am asking you when you were aboard ship.

A. I saw it and saw the screw I have described to you when I was aboard on April 30th, I think, of this year.

Q. And about how far did that screw project up from the surface of the clip?

A. It doesn't project up at all.

[fol. 369] Q. It is right on a level with it?

A. Yes.

Q. And that is a satisfactory way of making it fast?

A. That is a very common way of making it fast, a very common way.

Q. Now, directing your attention to Plaintiff's Exhibit No. 2 in front of the letter L: That is what is called the eccentric pit, isn't it?

A. Yes.

Q. And that was opened that way it is exhibited there in the photograph at the time you made your inspection?

A. Yes.

Q. What were the dimensions of that eccentric pit there?

A. Roughly speaking 2 feet long, and the shaft—well, now, what do you mean by the eccentric pit?

Q. I mean the space from the shaft to the figure L with the angle iron bars, calling that the depth, and I mean the width from the slush pan over to the step plate.

A. That is approximately 2 feet by some 18 or 20 inches wide.

Q. You testified to a great many measurements here, haven't you?

A. Yes, sir.

Q. And you have kept all those measurements in your head, haven't you?

A. Well, I think I testified to three up to now.

Q. Three?

A. Yes, I think that is all.

Q. What are they?

A. The distance from the grab rail to the center of that bearing. I testified to the diameter of the shaft, that is true; I testified to the height of the step here, and then I approximated the height of the step on this rung ladder; then, I approximated the height of the step, this one.

Mr. Engelman: No further questions.

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[fol. 370] Mr. Potter: Defendant rests.

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(Adjourned to June 14th, 1937, 10.30 A. M.)

[fol. 371] New York, June 14, 1937.
10.30 o'clock a. m.

Trial Resumed

Juror No. 10: I would like to know if the photograph shows the measurements of the step—the width and length.

The Court: Of what?

Juror No. 10: The width and length of the step.

The Court: I think it does not.

Mr. Engelman: That is my understanding.

Mr. Potter: That is correct, sir.

The Court: The answer to your question, Mr. Juror, is that the photographs do not show the dimensions.

Juror No. 10: Can we know the measurements?

The Court: I think we can get the evidence.

Is there anybody here who was on the ship?

Mr. Potter: I understand, your Honor, that it is approximately 10 by 7.

The Court: The juror wants somebody who knows and who is subject to cross examination. Is there anybody here who knows, who saw it and can approximate it?

Mr. Potter: Yes, sir.

The Court: Put him on the stand. The juror wants to know that.

[fol. 372] Thomas Laurence Stanley, recalled as a witness on behalf of the defendant, having been previously sworn, testified as follows:

Direct examination.

By Mr. Potter:

Q. Will you look at the photograph which you hold in your hand and give me the exhibit number, please.

A. Exhibit J.

By the Court:

Q. Have you actually seen that step on the ship?

A. Yes.

Q. The Yankee Arrow?

A. Yes.

Q. Did you measure it at the time?

A. I did not.

Q. Could you approximate its dimensions?

A. Yes.

Q. What would you say were the dimensions of the surface of that step plate?

A. Approximately 10 by about 8 inches, that is ten inches in width running fore and aft and sticking out from the bed plate possibly about eight or nine inches.

The Court: Is there anything else the tenth juror wants to know?

By Mr. Potter:

Q. The angle iron was an inch and a half?

A. The angle iron was an inch and a half and two inches long.

Q. The angle iron is the clip which you referred to in that [fol. 373] photograph?

A. The clip which screws the guard plate of the crank pit to the bed plate under the step, and that clip——

By the Court:

Q. What were the dimensions of the clip?

A. The clip is an inch and a half high by two inches long.

Q. You mean each side of the angle iron is one and a half inches?

A. One and a half one way and one and a half the other way, and the length of it is two inches.

Q. Is that connected with the bed plate at all?

A. It is connected with the bed plate.

Q. It is connected with the step plate?

A. No, sir, not at all. It is impossible for it in any way to touch the step plate.

By Juror No. 10:

Q. Are they countersunk bolts or machine bolts that hold the plate to the angle iron?

A. The one that holds the guard plate to the angle iron is a through bolt, and the one that screws the clip or the angle plate to the bed plate is a countersunk screw.

By the Court:

Q. Point out with your fingers the size of that.

A. (Indicating.) There is the angle plate. It is one and a half inches this way and one and a half that way and this way it is two inches long.

Q. How far from that step plate is that angle iron clip?

A. Approximately six inches.

Q. How high is the step plate from the floor?

A. Oh, about a foot—ten inches to a foot.

[fol. 374] By Juror No. 10:

Q. There are two angle irons used under that plate?

A. One, sir. There is no angle iron on the step plate at all.

Q. The step plate is fastened onto the angle iron?

A. No, sir, the step plate is fastened just by a bending of the step plate itself.

Juror No. 10: I see. I understand.

By Mr. Potter:

Q. Mr. Stanley, will you step down and show the jury where the fastenings of the step plate are, the two you have just described?

A. The only fastenings on the step plate are those two ⅝ tap bolts which are screwed into this step plate. There is no other provision made for fastening. This is the angle iron. That is fastened onto that flange with those two bolts which are shown in that photograph, and they are ⅝ tap bolts.

The Court: Show them the angle iron.

The Witness: This is the angle iron. It is 1½ inches this way, 1½ inches this way and 2 inches in width, this way; and is approximately 6 inches below that step plate and the step plate is about a foot from the floor plate. It is a little more than six inches—

Juror No. 1: It is 4 inches above the floor?

The Witness: It is about 5 inches above the floor.

[fol. 375] Juror No. 10: That is the diamond plate that is on the floor? The flat plate?

The Witness: Yes, sir, the diamond checker plate.

Mr. Potter: Your Honor, Juror No. 12 wants to ask a question of Mr. Stanley.

Juror No. 12: Just where is this slot located on this photograph? Is it determinable there?

The Witness: Which slot?

Juror No. 10: The slot that you put your hand down into.

The Witness: It is not shown in here, but it is down in the top of this keep. This bed plate keep is for the purpose of keeping these two halves of the bed plate in place. A binder you might call it. It is to bind that nut just in front of this oiling box.

Mr. Engelman: I think it can be illustrated here in Plaintiff's Exhibit 1, Mr. Stanley.

The Witness: It is right there (indicating). At the point marked "1." This is the bed plate keep which keeps the bearing rigid, in place. If you have got a hot bearing you want to get oil in there in a hurry, so you can shove this open and keep your oil can on top.

By Juror No. 12:

Q. You testified, if I remember rightly, on Friday, that if you put your hand in you might tear off the point of your [fol. 376] fingers. What is in there that would do that?

A. The shaft is in there through the bearings.

Q. But the shaft is absolutely smooth.

A. The shaft is absolutely smooth.

Q. What is in there that will take the tips of your fingers off?

A. If you get it jammed with the edge of the bearings.

Q. Is there any play? Is there any room between the edge of the bearings and the shaft?

A. A matter of thousands of an inch. With the speed that it goes around you are liable to get it rubbed if you put it in that way. These slots in these things are not in 95 per cent of the engines the same as this that are on ships all over the world.

Mr. Engelman: Now, your Honor, I would like to raise an objection to that. The juror didn't ask that question.

The Court: Just answer the juror's question.

Mr. Engelman: I would like to ask Mr. Stanley one question.

Cross-examination.

By Mr. Engelman:

Q. Mr. Stanley, in response to the question of Juror No. 12 you stated that if a man puts his finger down into the slot designated on Plaintiff's Exhibit No. 1 his fingers might be taken off. Is that correct, sir?

A. I said his fingers might become jammed in between the bearing—the top half of the bearing and the journal itself.

Q. The only moving part down there is the crankshaft itself?

A. The journal of the crankshaft.

[fol. 377] Q. And this crankshaft is being supported by the bearing, is that right?

A. Not the part of the bearing that you would have your hand in; it is being supported by the lower half of the bearing.

Q. By the lower half of the bearing?

A. Yes.

Q. And this bearing is fitted around this crankshaft possibly to within one-ten thousandths of an inch, is that right, sir?

A. I would say about somewhere between 1/10,000ths and 1/15,000ths. Probably 1/10,000ths.

Q. In other words, the bearing must fit very tightly around the crankshaft? That is its proper function?

A. The top half of bearing does not fit because if it did you would not have any room for your lubricating oil to get in there. You must leave 1/10,000ths of an inch diameter of clearance.

Q. Taking a man's finger nail, which is the smallest part of the hand, that finger nail is larger than 1/10,000ths of an inch?

A. I don't know; I never measured it.

By the Court:

Q. Isn't the purpose of the bearing to fit as snugly around the shaft as it can and still allow the shaft to revolve?

A. Yes.

Q. That is the purpose? To fit as snugly around the shaft as it can and still allow the shaft to revolve?

A. That is right.

Q. And for the lubricating?

A. You have to leave enough clearance for that.

Q. The purpose of the mechanism is to make the bearing [fol. 378] fit as tightly and as snugly against the shaft as possible and still allow the shaft to revolve?

A. That is correct.

Mr. Engelman: No further questions.

By Mr. Potter:

Q. Referring to the slot or hole does it serve any use in the feeling of the bearing?

A. It does not.

Q. How do you feel the bearing?

A. You feel the ends of the bearing.

The Court: What is that?

The Witness: You feel the outside end of the bearing whether it be the crankshaft bearing or the main bearing. We have no such slot in the bearing to do such a thing.

By Mr. Engelman:

Q. Did you put your hand in this slot or hole designated on Plaintiff's Exhibit 3 by the No. 1 when you made your inspection on April 30, 1935?

A. I did not because I don't think I could reach the shaft with my hand. My hand is too small.

Q. You mean that the hole is not large enough to accommodate your hand?

A. My hand is not large enough to reach it.

Q. Did you look in there?

A. I didn't look into the hole; I looked at it in the course of looking around that general vicinity.

[fol. 379] Q. But from your experience in these engines of that type you know that if the hand is put in there you can feel the bearing?

A. From my own personal experience I do not, because I have never been on a ship in my life as an engineer that had such a slot.

Q. That was the first time you have seen it?

A. No, I have seen them before, but I have never been on a ship that had one.

By the Court:

Q. You mean working on a ship?

A. Yes, sir.

Q. You mean working on a ship?

A. As an engineer or surveyor except possibly to observe one other than this ship.

Mr. Engelman: No further questions.

Mr. Potter: That is all.

The Court: I understand the defendant has rested?

Mr. Potter: Yes, sir, we rested Friday afternoon.

The Court: Does the plaintiff rest?

Mr. Engelman: No. I would like to call one witness.

[fol. 380] Harry J. Liverpool, called as a witness on behalf of the plaintiff, in rebuttal, being duly sworn, testified as follows:

Direct examination.

By Mr. Engelman:

Q. Mr. Liverpool, do you hold a chief engineer's license?

A. Yes, sir.

Q. Is it an unlimited license for any type of ship, any tonnage, and any ocean?

A. Yes, sir.

Q. How long have you held such a license?

A. Since 1928.

Q. Will you tell us briefly, sir, when you first started to get experience in connection with marine work and what that experience has been briefly down to the present time.

Mr. Potter: Your Honor, I desire to object at this time on the ground that this is rebuttal. If the plaintiff seeks to show by this witness anything in the way of expert testimony by a mechanical man or an engineer I object to it on the ground that it is not rebuttal. It should have been offered as part of his main case. It is no part of rebuttal, he having relied in his main case on the testimony of the plaintiff himself and having offered no expert testimony or no theory as to expert testimony so that the defendant would have an opportunity to meet it. It is improper for the first time in his rebuttal to offer testimony of an expert character.

The Court: Don't you understand, Mr. Engelman, rebuttal evidence to be directed to new evidence brought out [fol. 381] by the defendant? In other words, the defendant proves his case by denying whatever the plaintiff may have testified to and he also may bring out some new facts and new defenses. As to those you have a right to rebut them, but you must make your case yourself. Tell me the purpose of this witness.

Mr. Engelman: The purpose of this witness is to do only one thing: that is to rebut certain evidence presented by the defendant and it goes no further than that and I will seek to go no further than that.

The Court: What do you mean by rebuttal evidence? Rebuttal evidence must be evidence directed to some new fact not constituting the denial by the defendant. That is rebuttal as I understand it. One gives his case, proves his case, and the other tries to disprove it. If besides disproving what the plaintiff has proved he brings in new facts you can bring testimony in to disprove that.

Mr. Engelman: If I put my question to the witness you will see what I am after.

The Court: Do you object to telling me?

Mr. Engelman: Absolutely not.

The Court: Then tell me.

Mr. Engelman: I seek to prove by this witness essentially these facts: one, that it is the customary and usual prac-

tice in the American merchant marine for engineers to instruct their oilers as to how their job is to be done.

The Court: Why isn't that part of your main case? That [fol. 382] is what you allege in your complaint in the bill of particulars.

Mr. Engelman: I did that in a general way.

The Court: I mean that you must prove your case first. You can't have two chances at your case. You must prove your case.

Mr. Engelman: I am not asking for that, but their own engineers admitted on the witness stand that they gave no instructions to this plaintiff in connection with the manner in which he was to do and perform his work, and I didn't in my affirmative case attempt to anticipate that.

The Court: You have alleged that as part of your cause of action, as one of the elements of negligence. Do you want me to read it?

Mr. Engelman: No.

The Court: You should have proved that as part of your case and not come in at the last hour and produce a witness to prove your case. They may have let all their witnesses go out to sea. Anyway, I will let you go on. I will give the defendant an exception, which may be a very good exception.

Mr. Potter: Exception, your Honor.

Mr. Engelman: Thank you, your Honor.

The Court: You may not want to thank me. It may be a very good exception. His witnesses may all be gone out to sea. Now, go ahead.

Q. Would you answer the last question, please?

[fol. 383] By the Court:

Q. Did you say you have a license?

A. Yes, sir.

Q. What is your experience? Tell the jury.

A. I went on a school ship in 1901, a Massachusetts school ship.

Q. As what?

A. As a cadet and graduated in 1903.

Q. From the school ship?

A. Yes, sir.

Q. As a cadet?

A. Yes, sir.

Q. That doesn't mean that you had to do with the mechanics of the ship?

A. As a marine engineer. That is what I was going to say.

Q. Go ahead.

A. Then I went into the machinist ship

Q. Machinist ship?

A. Yes.

Q. On land?

A. Yes, sir.

Q. What was the nature of your work at the machinist ship?

A. Steam engine work.

Mr. Potter: Marine?

The Witness: Yes.

Q. Marine and other steam engine work?

A. Mostly marine. I worked at the Atlantic Works in Boston and the Boston Engineering Company and the New York, New Haven & Hartford Railroad at steam engines, and a number of other small companies.

Q. How long were you with the New York, New Haven & Hartford Railroad?

A. I served my term in the New York, New Haven & Hartford Railroad.

[fol. 384] Q. How long?

A. Two years as special apprentice.

Q. In the machine shop?

A. Yes.

Q. Was that on locomotives or marine engines?

A. That was on locomotives.

Q. Not marine engines?

A. No, sir. Then when the war came around I was asked to get a license so I got one.

Q. For what?

A. Marine engineer. Having been a graduate of the school ship they asked me to go to sea. They were short of men. Since then I have been following the sea up to about three years ago.

Q. I don't know what you mean by following the sea.

A. As an engineer.

Q. What did you do?

A. The last three years I was out of employment for about a year or so. Then I started a machinist school for marine engineers.

Q. What did you mean when you said you followed that up?

A. I followed marine engineering.

Q. Did you go aboard ship?

A. Yes.

Q. What ships were you on?

A. I was on ships for about ten years.

Q. What about the last three years?

A. In the last three years I haven't been on board ship.

Q. What was your expression? Following up what?

A. Marine engineering. Now, I have got a school and I work as a machinery instructor.

Q. Whereabouts?

A. 109 Broad Street, New York.

Q. How many people do you have?

A. I have got about six now, two from the State.

[fol. 385] Mr. Engelman: Have you served as a chief engineer?

Q. After you graduated as a cadet did you go to sea?

A. Not right then.

Q. Since then how long have you been at sea?

A. Since 1917.

Q. How many years since 1917?

A. Since 1917 to about 1933.

Q. Steadily at sea?

A. Yes, sir.

Q. On what ships?

A. Different ships.

Q. Name them.

A. Well, I was with the fleet in 1924 down at Staten Island. I was chief engineer of the Tad Jones, chief engineer on the steamship Beta, first assistant on the Alpha, and first assistant on the Clement Smith. Well, there are a number of different ships that I was on—a variety—but mostly ships of the cargo type and oil tankers.

By Mr. Engelman:

Q. Have you served on a vessel known as the Robert Hopkins, sir?

A. No, sir.

Q. Will you tell us, Mr. Liverpool, whether it is the customary and usual practice in the American merchant marine

for the engineers to instruct the oilers as to the manner in which bearings are to be felt?

A. Yes, sir.

Mr. Potter: Just a minute. That is objected to on the ground, first, that it is not rebuttal; secondly, the witness manifestly is not qualified to testify as to custom; thirdly, [fol. 386] on the ground that there is now being presented on rebuttal a new theory, namely, that there was no instruction and that the plaintiff was an inexperienced man.

All last week while this case was on trial it was stated again and again and again that the plaintiff's theory was that there was a missing bracket, and it was said over and over again that his case must fail or succeed by the presence or absence of the missing bracket; and here at the last minute a new theory is being interjected into the case, and that I object to.

The Court: Why aren't you at the last minute injecting an absolutely new theory? Your evidence was all directed to the negligence of the defendant in failing to supply a safe place to work in. That was your main case, wasn't it?

Mr. Engelman: That was the main case, but within the confines of the pleadings——

The Court: Do you think a plaintiff can try his case and when you think he may have met it successfully then come in on a new theory and put in new testimony? Suppose he meets you on this theory, can you then go on tomorrow and try to prove that the accident happened through some other negligence on the part of the defendant? The jury wants to do what is right and the judge does and you do. Frankly speaking, what was your theory on which you expected to recover until this morning?

Mr. Engelman: I haven't in any way forsaken my original theory.

[fol. 387] The Court: When must you prove your theory? You may allege a million things in your pleadings; it is the trial that counts; not what you allege in the complaint. Your complaint may have twenty or thirty different theories on which you might recover. Then you go to trial and put in your proof and the defendant introduces his evidence to meet yours. Now you are introducing new testimony. If Mr. Potter will say that he is entirely surprised and unprepared to go on to meet the issue what can I do? What can I do if he takes the attitude that today he is entirely unpre-

pared to meet that issue? He has no notice. What can I do? You are a lawyer; answer it.

Mr. Engelman: Your Honor, my theory is that by evidence of this kind I am simply rebutting. Maybe I am in error. If your Honor feels that I am, I will withdraw the question.

The Court: Did you introduce any evidence as to instructions in the case?

Mr. Engelman: I did not, no.

The Court: Did the defendant introduce any?

Mr. Engelman: They did, yes.

The Court: They did? Then there might be rebuttal on that, but show me where they did.

Mr. Engelman: As I recall, the first assistant engineer admitted that he never at any time gave any instructions to the plaintiff in connection with the carrying out of the work. [fol. 388] The Court: He didn't say that he did. What more do you want? If the first assistant engineer did say that what more do you want? Do you want to rebut that and show that he did give instructions? He said that he didn't; do you want to prove that he did?

Mr. Engelman: If your Honor thinks that it is not proper I will withdraw the question.

The Court: I will ask Mr. Potter and if he tells me that it won't take him by surprise I will use my discretion and let you go into it.

Mr. Potter: Your Honor, I am surprised and I am not prepared to meet this new issue. All my witnesses have gone to sea. I rested my case on Friday. Counsel for the plaintiff said that he didn't know that he would have any rebuttal and that if he had any it would be not to exceed ten minutes. He certainly gave no intimation to me or indication at that time that he intended to inject a new issue in this case. Therefore, I claim to be surprised by the tender which is now made.

Mr. Engelman: I withdraw the question.

By Mr. Engelman:

Q. Mr. Liverpool, I show you Defendant's Exhibit J. Let us say that where the figure 2 appears on that photograph that that is a support which goes around the bearing and that where the figure 8 appears is the edge of the bearing [fol. 389] and that where this line is drawn that I am indicating directly below the figure 8, that the bearing extends

from one end of that line to the other, and that on Plaintiff's Exhibit No. 1 where the figure 3 appears there is an opening or well about eight inches in depth, and that feeling down into the bottom of that well you can feel the crankshaft and the bearing. Now, assuming those facts to be true, can you express an opinion with reasonable certainty at what particular point on Defendant's Exhibit J an oiler in the course of his duties would feel that bearing illustrated by the line on Defendant's Exhibit J?

Mr. Potter: That is objected to.

The Court: Do you understand the question?

The Witness: Yes, sir.

Mr. Potter: That is objected to on the ground, first, that it is not rebuttal. Secondly, I object to it on the ground that it is not relevant and not material. Thirdly, I object to it on the ground that the witness has not been qualified. Fourth, I object to it on the ground that the witness is now shown photographs and asked a hypothetical question concerning those photographs and is asked a question which has absolutely no relevancy to the issue now on trial.

The Court: As to what do you want him to express an opinion on those facts? What is the ultimate question that you are asking?

(Question read.)

[fol. 390] By the Court:

Q. Have you got sufficient facts to enable you to express an opinion on that?

A. Yes, sir.

Q. Have you got sufficient facts to express an opinion without knowing dimensions?

A. Yes, sir.

Q. Without knowing the distances, without knowing how far he has got to stretch to reach it?

A. No, I cannot tell you how far he has to stretch. I know where I would feel the bearing, but not how far.

Q. Have you got sufficient facts to tell where the oiler should stand in order to touch that bearing unless you know the distances from where he was standing or where you state he did stand from the bearing?

A. I know approximately how far he would have to reach.

Q. Where you on the Yankee Arrow?

A. I was on one similar to that.

Q. How do you know it was similar?

A. Well, those ships are built by Humphries.

Q. Don't forget that you are under oath.

A. It is built pretty nearly the same as Humphries builds them.

Q. Are they built by the same builder?

A. No, I don't think so.

Q. Do they have the same engines?

A. Yes, they have pretty nearly the same engines.

Q. Did you see it?

A. I have seen the engines on the Arrow boats. They are pretty nearly the same.

Mr. Potter: I object to his testimony if he has never been on board the Yankee Arrow, and he has not been.

[fol. 391] Q. Who made the Yankee Arrow engine?

A. I don't know, sir.

Q. Who made the engines on the boats you were working on?

A. I don't know. It is some years back.

Q. Why did you tell the jury you know approximately how far he would have to reach?

A. The way they are built. They are built the same way——

Q. Are shafts built in proportion to the length of the ship?

A. They are built to the horsepower of the engine.

Q. To the horsepower?

A. Yes, sir.

Q. Don't the dimensions differ on different ships?

A. They vary a little.

Q. They vary a little? The distances vary?

A. Yes, sir.

Q. Can you answer the question that was put to you without knowing the distances?

A. What I assume he wanted me to answer——

Q. You are not to assume what he wanted you to answer. You are not here to answer questions on his assumption as to how he wants them answered. You are under oath to express your best opinion.

A. I can just give my best opinion as to how I would do it.

Q. What would you do?

A. Feel the bearing on both sides and the center.

Q. What did he ask you?

A. That is the way I understood the question.

Q. What did he ask you? I ask you whether you understood the question.

A. This is the line. That is where the bearing is. Down in here and down in there is about where I would feel that engine.

[fol. 392] Q. Where would you stand to feel it?

Mr. Engelman: May I interrupt your Honor? I think your Honor has misunderstood me. I haven't given any dimensions to this witness. I am not raising the issue as to how far he could reach or where he has to stand. That I don't care about. This man was never on the ship. He is not qualified in any way——

The Court: What is it you want to know?

Mr. Engelman: I am only asking him one simple thing: in his experience as a chief engineer where he would feel that bearing.

The Court: Now, let us read your question.

(Question read as follows: "Q. Mr. Liverpool, I show you Defendant's Exhibit J. Let us say that where the figure 2 appears on that photograph that that is a support which goes around the bearing and that where the figure 9 appears is the edge of the bearing and that where this line is drawn that I am indicating directly below the figure 8, that the bearing extends from one end of that line to the other, and that on Plaintiff's Exhibit No. 1 where the figure 3 appears there is an opening or well about eight inches in depth, and that feeling down into the bottom of that well you can feel the crankshaft and the bearing. Now, assuming these facts to be true, can you express an opinion with reasonable [fol. 393] certainty at what particular point on Defendant's Exhibit J an oiler in the course of his duties would feel that bearing, illustrated by the line on Defendant's Exhibit J?")

Mr. Engelman: I would like to add this: "Feel the bearing on either Defendant's Exhibit J or Plaintiff's Exhibit No. 1."

The Court: See whether you can simplify your question. What do you want to know? Where he would feel that bearing?

Mr. Engelman: That is all.

The Court: What part of the bearing he would feel?

Mr. Engelman: Yes, sir, that is about it. That is the question.

By the Court:

Q. If you want to find out whether the bearing of a low pressure journal, a low pressure journal bearing, is becoming heated or not, what part of that journal or bearing would you feel?

The Court: Is that what you wanted to know?

Mr. Engelman: No, that is not. I just wanted to know what I stated in the question.

The Court: What?

Mr. Engelman: What I want to know is what the question calls for.

The Court: What is it? I don't understand it.

[fol. 894] Mr. Engelman: All right. An oiler in the course of his duties has to feel this L. P. journal or bearing, which I understand is one and the same thing. Now, we have the length of the bearing. Their witness, Mr. Stanley, testified to the length. It projects out a little of this bracket support on one side and then underneath and then there is this little well leading into the bearing. The substance of their testimony is that the place to feel the bearing would not be down through this well but on the side. Now, I am attempting——

Q. When a bearing becomes overheated does that mean that it heats the mechanism?

A. It heats that journal.

Q. What does it heat? Does the shaft itself become hot?

A. Yes, sir.

Q. And does the bearing become hot?

A. Yes, sir.

Q. And does the housing of the bearing become hot?

A. If it goes long enough without oil.

Q. Now, he wants to find out whether the bearing becomes heated or not what part of the journal or the bearing or the shaft your would feel.

The Court: Is that what you wanted to know?

Mr. Engelman: Yes.

A. The closest point you can come to the turning surface is the place. If you can touch the turning surface that is the proper place.

[fol. 395] Q. You would advise touching the turning surface?

A. Yes.

Q. And the turning surface is the shaft?

A. Yes.

Q. You would advise touching the turning surface?

A. Yes, I would instruct my oiler to do that.

Mr. Potter: I move to strike that part of his testimony out.

The Court: I will strike out that part in which he said he would instruct the oiler to do that and leave in that he himself would touch the turning shaft.

Mr. Potter: The plaintiff in this action says that he was feeling of the bearing. That is what he wanted to do. I say all this testimony is wholly irrelevant. All testimony as to what this particular witness would do or anyone else would do is wholly irrelevant.

Q. Is the journal and the bearing the same thing?

A. Yes, sir.

Q. Journal and bearing are the same?

A. It is practically the same.

The Court: Get a dictionary on that. Are they or are they not?

Mr. Engelman: I don't know, your Honor.

The Court: You are trying the case.

The Witness: We call them that.

The Court: What is that?

The Witness: One man will call it journal and another will call it a bearing.

[fol. 396] By Mr. Engelman:

Q. Now, looking at these two photographs, Defendant's Exhibit J and Plaintiff's Exhibit No. 1, can you tell us or illustrate on those photographs the particular point at which the bearing should be felt?

Mr. Potter: That is objected to.

The Court: He said he would not feel the bearing. He said he would feel the shaft. Isn't that what you said?

The Witness: Yes, sir, I would feel the moving part if I can.

Q. And at what point would you feel that?

A. Right through that hole.

By the Court:

Q. Where?

A. Through the hole in the cap of the bearing (indicating).

Q. You would put your hand through that hole to feel the bearing?

A. Yes.

Q. To feel the shaft?

A. Yes, sir, to feel if it is warm.

Q. Before you got to the shaft you would put your hand into that hole and wouldn't you strike the bearing and not the shaft?

A. It is a round hole. You would probably strike it on the way through.

Q. Would you strike the bearing or would you strike the shaft?

A. If you went down clear to the bottom you would strike the shaft.

Q. Underneath that hole what would you strike first?

A. The hole goes through the bearing.

[fol. 397] Q. The hole goes through the bearing?

A. Through the cap.

Q. You would advise a man to put his hand through there with the shaft turning?

A. Yes, sir.

Juror No. 12: Is the shaft exposed through that hole?

The Witness: Yes, you can see it.

Juror No. 12: You can see the shaft through the hole moving?

The Witness: Yes, sir.

By Mr. Engelman:

Q. Have you had any experience in setting crankshafts in bearings?

The Court: Mr. Engelman, did I understand that these injuries were not sustained by reason of any place that he touched or any place that he reached towards? He main-

tains that the injury was sustained by stepping back, that after he touched it nothing happened. The whole case depends on what happened after he touched whatever he wanted to touch and the injury was sustained by stepping back and stepping onto a loose bracket. Isn't that the issue?

Mr. Engelman: But the defendant has said that the plaintiff should not have attempted to touch that. It is a collateral issue.

The Court: The accident didn't happen through the spot he touched. He said that it was the stepping back after [fol. 398] he felt it that caused the accident. He was not hurt or harmed by feeling it. He said that after he felt it and he was through feeling it he stepped back, and I think it was his left foot hit a broken or out of place bracket that threw him off balance, and he fell; is that right?

Mr. Engelman: That is correct.

The Court: So the accident didn't happen through any improper feeling of the bearing.

Mr. Engelman: But you see, my point is that the defendant through testimony is attempting to show that the plaintiff got up on this step plate to feel of a certain place where he didn't have to feel, and if he hadn't gotten up there and didn't feel of that particular place then the accident would not have happened, loose bracket or not.

The Court: I get your point. What did you want to get?

Mr. Engelman: I have already elicited through this witness that it should be felt through this hole.

The Court: He testified that he should put his hand through that hole. What is the size of that hole?

Mr. Engelman: He didn't say.

By the Court:

Q. Do you know how wide that hole is?

A. No, only the ones on the ships that I have been on.

[fol. 399] Q. Do those holes taper?

A. Yes, sir.

Q. They taper towards the bearings?

A. Yes.

Q. Do you know the circumference on the top?

A. No, sir, not on this boat.

Q. To what point do they taper?

A. They taper down.

Q. How small is the hole?

A. Those I have been on I could put my hand right into it.

Q. Don't they differ in size?

A. Not any I have been on. I could always get my whole hand in. I have a small hand.

Q. What is the purpose of that hole? To put your hand in?

A. Lubrication.

Q. To put oil in?

A. Yes, sir, grease and oil.

Q. How big is that hole on some ships?

A. I could get my hand in.

Q. Right through to the bearing?

A. Yes, sir.

Mr. Engelman: No further questions.

The Court: Is that all?

Mr. Engelman: That is all from the plaintiff as to this witness.

Mr. Potter: No cross-examination.

The Court: The dictionary gives the definition of a journal as that part of a shaft or an axle which rotates in or against the bearing. Therefore it is not a bearing. This is the definition: "That part of a shaft or axle which rotates in or against the bearing."

(To the witness): You still say that they are the same, the journal and the bearing?

The Witness: Yes, sir.

The Court: Now, let us see what it says about bearing. [fol. 400] "The bearing is a part of a machine on which something rests." It doesn't make them synonymous.

(To the witness): You still say that a journal and a bearing are the same thing?

The Witness: I wouldn't say exactly that.

The Court: Well, you are an engineer and a graduate of a school ship. Do you still say that a journal and a bearing are the same thing?

The Witness: Well, we classify them the same. If I say that the bearing is hot, roughly speaking, I mean that the journal is hot. I am not speaking in a technical sense. You are speaking technically.

The Court: Technically it wouldn't be?

The Witness: No.

Mr. Engelman: At this time I would like to offer in evidence a photograph which has been given to me by the defendant. It is one of the photographs not so far offered in evidence. It shows the ceiling or the overhead grating of the engine room.

Have you any objection, Mr. Potter?

Mr. Potter: I most certainly have.

The Court: What?

Mr. Potter: I most assuredly have. There isn't any evidence to support the statement just made to you by Mr. Engelman, and most assuredly it was part of his main case and it is not rebuttal of anything. It is not authenticated.

The Court: Show me the picture.

Mr. Potter: There is no proof of anything. I object to [fol. 401] any case being presented in any such manner.

The Court: What is the objection to it? I mean outside of your objection that it is not rebuttal.

Mr. Potter: Your Honor, my witnesses have left the jurisdiction. They are gone to sea.

The Court: Yes, I understand that. I understand that the only purpose is that he wants to show a grating over the engine room.

Mr. Potter: I object to it being offered for any reason.

The Court: Is that all you want to show?

Mr. Engelman: Your Honor, the defendant's witnesses said that this step plate was not used for the purpose of reaching over and feeling the bearings, and that it was used when the ship was in port for the purpose of reaching overhead moving machinery. Now, I thought the jury might like to see the ceiling or grating on top of the place where the accident occurred. That is the only purpose of it.

Mr. Potter: Your Honor, my objection is this: I object first on the ground that it is not rebuttal; secondly, on the ground that it is not relevant; thirdly, on the ground that there is no proof of any character as to what that photograph which you now hold in your hand is; fourthly, I object on the ground that while the defendant's witnesses were on the stand was the correct time or while the plain- [fol. 402] tiff was on the witness stand, was the correct time to exhibit it had he intended——

The Court: Mr. Potter, is there any evidence in the case that that step was put there in order to reach the ceiling?

Mr. Potter: No, sir, there is not.

The Court: You said there was, Mr. Engelman.

Mr. Engelman: I didn't say that there is evidence that it was put there to reach the ceiling, but I say that their own witnesses have testified that its purpose was for a man to stand there and reach overhead.

The Court: To make repairs?

Mr. Engelman: Yes.

The Court: This picture does not affect that.

Mr. Engelman: It does in this way:——

The Court: I will tell the jury that the picture shows, with Mr. Potter's permission, that over the engine room on account of the heat instead of being a ceiling it is an iron grating.

Mr. Potter: I have no objection to your so stating.

The Court: It is conceded that that is a fact.

Mr. Potter: Yes.

The Court: The top of the engine house consists of an iron grating through which air can pass. There is no objection to that, is there?

Mr. Potter: No, sir.

The Court: I believe most engine houses are built that way.

[fol. 403] Mr. Engelman: The plaintiff will rest.

The Court: And the defendant rests?

Mr. Potter: The defendant rested on Friday afternoon.

The Court: I mean in view of the new testimony. Will the defendant put in any further testimony?

Mr. Potter: No, sir, the defendant rests.

Both sides rest.

Renewal of Motions to Dismiss

Mr. Potter: I now renew my motion to dismiss the first cause of action on the ground that the plaintiff has failed to establish the cause of action alleged in the complaint or any other cause of action. The first cause of action, your Honor, is the one for indemnity for negligence. Secondly, I renew my motion on the ground that the plaintiff assumed the risk of the alleged defect. Thirdly, on the ground that if there were any absence of any bracket or any defect in the step plate or its appliances it was open, obvious and

apparent. The plaintiff himself says that he knew it and that he called one of the officers' attention to it.

Now then, I say that if under such circumstances he used this alleged defective step he assumed the risk of being injured himself; and I further claim that where there are two methods or two ways of doing a particular job or act aboard ship when the plaintiff is acting under general orders he assumes the risk himself of adopting a method which is more dangerous than the safe method.

[fol. 404] The Court: I am sending for a case that will answer your assumed risk argument.

Mr. Potter: The Beadle case?

The Court: Yes.

Mr. Potter: Yes, I have read that case and the Arizona case, too.

The Court: What is that?

Mr. Potter: I have read both the Beadle case and the Arizona case.

The Court: I will deny your motion.

Mr. Potter: May I have an exception, sir?

I move to dismiss the third cause of action, that being the cause of action for maintenance and cure, on the ground that the plaintiff has failed to establish that cause of action or any other cause of action for maintenance and cure, and that under the evidence in the case as it now stands on July 13, 1935, the plaintiff was discharged from the U. S. Marine Hospital at Galveston as fit for duty, and there is no evidence that during the period from June 5, 1935 to July 13, 1935, that he paid any amount whatsoever for maintenance or cure.

The Court: Motion denied.

Mr. Potter: May I have an exception, sir.

(Mr. Potter summed up the case to the jury on behalf of the defendant. During the summation the following occurred):

Mr. Potter (Reading): "In your opinion was he at that time in fit physical condition to perform the work of an oiler or seaman? A. Yes."

Mr. Engelman: Your Honor, I object to reading to the jury any of the depositions in this case. They have already been read into evidence. They are part of the record. They are not exhibits. The deposition from which Mr. Potter

[fol. 405] is reading is not an exhibit in the case, and it is highly improper for him to read a deposition to the jury.

Mr. Potter: Your Honor, my point is this: I have a perfect right to instead of relying on my recollection and memory to read from the record, and I am only now reading from the stenographer's transcript of what transpired.

The Court: Yes, your objection is overruled. You have an exception.

(Mr. Potter continued the summation.)

(Mr. Engelman summed up the case to the jury on behalf of the plaintiff. During the summation the following occurred):

Mr. Engelman: There are Dr. English and Dr. Brownridge. They are the defendant's doctors.

Mr. Potter: That is objected to. There isn't any testimony in this record that Dr. English or Dr. Brownridge or the doctors in New York are the defendant's doctors.

The Court: In arriving at your verdict you will be guided by your own recollection of what the testimony was and not by counsel's statement. It is your recollection that is controlling.

(Mr. Engelman continued with the summation, during which the following occurred):

Mr. Engelman: I can assure you that this plaintiff has been thoroughly investigated in Providence.

Mr. Potter: Now, your Honor, that is objected to. There isn't any evidence as to that.

The Court: There is no evidence about that.

(Mr. Engelman continued the summation.)

The Court: Have you gentlemen any requests to charge?

Mr. Engelman: Yes.

[fol. 406] Mr. Potter: None by the defendant, sir.

The Court: We will take a recess for five or ten minutes and then I will charge the jury.

Mr. Potter: I have only one request.

The Court: I will allow you to make it afterwards.

Mr. Potter: Yes, sir, afterwards.

(Short recess.)

Bondy, J.:

The Court: Gentlemen of the jury, this plaintiff Herbert A. Smith, Jr., brought an action against the defendant, the Socony Vacuum Oil Company, Incorporated, to recover damages for personal injuries which he contends he sustained through the sole negligence of this defendant. In his complaint and in his bill of particulars he alleges among other things that the defendant failed to give him a safe place to work in and that it failed to maintain the place in which he worked and the appliances therein in a reasonably safe condition and that by reason of defendant's failure so to do he sustained the injuries of which he is complaining. He also alleges in his complaint that he is entitled to recover his expenses for maintenance and cure. The defendant in its answer denies that it failed to give the plaintiff a safe place within which to work and safe appliances and it denies that it failed to keep such place [fol. 407] and appliances safe. It denies that the injuries which he sustained were sustained through any negligence on the defendant's part and alleges that whatever injuries the plaintiff sustained the plaintiff sustained solely through negligence on his own part.

Gentlemen, the simple issue for you to determine is whether or not the defendant failed to give the plaintiff a safe place in which to work, whether it maintained the place in which the plaintiff was to work in a safe manner and whether the injuries which the plaintiff sustained were sustained as the result, the proximate result, of the defendant's failure to supply a safe place or to keep the place in which he worked in a safe manner. You will also be called upon to determine whether the injuries which he sustained were sustained solely through the defendant's failure or whether his negligence in any way contributed to the injuries which he sustained.

Now, gentlemen, you are the sole judges of the facts. That means that you must pass upon the credibility of the witnesses. In determining the credibility of a witness you may take into consideration the story which the witness told, the manner in which he told it, the probability of the story being true, and the interest, if any, of the witness. In other words, you are to say how far each one of the witnesses is

telling the truth. It is for you to believe all or any part of any witness' story as you see fit.

I shall now very briefly refer to some of the facts in this case, however, emphasizing that it is you, and not the court, that are the judges of the facts; and therefore, if I make any statement which does not agree with your recollection [fol. 408] of the testimony, it is your recollection and not my statement which is to guide you in arriving at the result. I am only referring to some of the facts. You gentlemen in arriving at your verdict may take into consideration all such facts as you think you should whether or not they are referred to by the court.

You will remember that the plaintiff took the stand, that he testified that in 1934 he started to go to sea, that in 1935, I think April, 1935, he was employed aboard the ship owned and controlled by the defendant and called the Yankee Arrow, that he was employed as an oiler, that the ship left Baltimore where he boarded it and went to Erie Basin to undergo repairs. You will remember that he testified that at Erie Basin he told one of the officers that the step plate was out of repair and that it was loose and that the bracket was loose or worn and out of repair, that after leaving Erie Basin the Yankee Arrow proceeded to Baltimore for a trip which it was to make from Baltimore to Beaumont, Texas, that the ship started on the voyage, I think it was, on May 28, that he was employed on that voyage as an oiler, that it is the duty of an oiler every twenty minutes to feel the low pressure journal to see whether the bearing is overheated or not, that on June 2 he proceeded to feel the low pressure journal or the low pressure journal bearing, that he put the right foot on the step plate and put his left foot on the bearing support and held the slush pan with his left hand, that he felt the low pressure journal with his right hand, that after he felt it he moved to step back, that his left foot struck a part of a bracket which was in- [fol. 409] tended to support the plate and which extended beyond the plate, that his left foot struck that bracket, that he lost his balance, that he fell into the crank pit between the eccentric, I believe he said, and the low pressure journal, that in falling into the pit his back struck a piece of angle iron, that he was picked up, I believe he said, by the first assistant engineer, carried to a different part of the engine room, that there he fainted, and that when he came to he was covered with water. He said that he hurt the right side

of his back, that he hurt two of his fingers, that his back bled and that his fingers bled. He also testified that one of the seamen—I think he said he was a fireman—helped him up to the main deck, that on the main deck two other seamen took him to the captain's room, and that there the captain gave him some gauze and unguentine and told him to take care not to get any blood over his carpet, and to go back and wash up. He testified that two seamen went back with him, that he went into his bunk, that he stayed in his bunk until the ship on June 4 made port at Beaumont, that the first day he didn't receive anything to eat, that on the second day some seamen gave him something to eat, and that after that he could get all the food he wanted.

At Beaumont, he said, he couldn't pack, that some of the seamen helped him to pack, that he couldn't carry his grip and one of the seamen helped him with his grips to a taxicab, and that he went to see the doctor at Beaumont on June 4. He said that on June 5 he went to the United States Marine Hospital at Galveston, that he stayed there a week, that he was treated for jaundice, that while there he under- [fol. 410] went an operation, and was circumcised. He testified that there he received therapeutic treatment—I believe he said an oil massage—and that he received heat or violet ray treatments, and that he stayed there from June 5 to July 13, I believe it was. He said he was confined to bed for a week while at the hospital at Galveston and that after he was discharged there on July 13, he went to the hospital and the Public Service Health Department at Houston and that there the doctor strapped him several times. He also testified that some of the seamen strapped him with a piece of tape while aboard the Yankee Arrow before he landed, and he also testified that he received some therapeutic oil massage and heat or violet ray treatment, and that the doctor strapped him several times at Houston. From Houston he went back to Beaumont. There he again saw the doctor he had seen before, who, I believe he said, strapped him and also gave him some treatment. He testified that thereafter in August he took a ship and went home and then went to New York. I think he said that he went to the Hudson Street United States Marine Hospital and there he received similar therapeutic treatment. He also testified that he worked as a carpenter for his brother part of the time and also for others, and that he did some light work. He testified that he still felt pain, that when he worked a long time

he felt that he could not go on, that he could only work for a short time or a limited time, and that he found that he could raise only very light weights and not lift anything that was heavy. He said that while he was testifying he had pain. He testified that he worked 340 days since the acci- [fol. 411] dent; that he was allowed aboard ship $75 for services as a seaman, and that it cost him $2.50 a day or about $75 a month to maintain himself. He said that while working as a carpenter he was getting from sixty-five cents an hour, which his brother gave him, to, I think, a dollar. He also testified that he saw the doctor at Beaumont, I believe it was, and paid him $3 a visit for three visits. He said that he went to see a chiropractor, that he went to see him about ten times, and that he paid him about $3 a visit. He said that the gauze and oil that he bought cost him about $10. He said Dr. Young, whom he consulted after he came north, told him that nothing more could be done for him, and I think he said that he paid him $3. In other words, I think he testified, if my memory serves me correctly, that he did expend about $50 in trying to obtain his cure.

Gentlemen, you have heard witnesses for the defendant testify. You have heard, for instance, the first assistant engineer testify that there never was a bracket under this step plate which he could have struck or which could have become loose or could have been out of place or been out of repair; that there never was such a bracket there. He testified that the step plate was made fast to some part of the structure of the ship by means of two nuts and bolts. He also testified that he has never seen any oiler step upon the step plate to feel the low pressure journal. He said that that could be reached when the oiler was standing on the floor and that he always saw the oilers reach or feel the journal while standing on the floor. There is a conflict of evidence too as to whether the oiler could hold the grab-iron [fol. 412] with one hand, with his right hand, and reach the bearing with the left hand. The defendant's witnesses testified that neither the grab-iron nor the step plate were put on the ship for the purpose of helping the oiler reach or feel the bearing. He said that the plate was put there to be stepped on principally when making repairs in port. The first assistant engineer, who picked up the plaintiff after he fell, testified that he was not unconscious. He testified that he saw the plaintiff go to the main deck unassisted, that nobody assisted him. Witnesses for the defendant

also testified that they saw him come up on the main deck unassisted and that he walked to the captain's room unassisted and came from the captain's room unassisted. The oiler or seaman who was sent to relieve the plaintiff testified, if I remember rightly, that he did relieve him and that after a half hour or an hour the plaintiff came back into the engine room and said that he could stand his watch, and that he then left the plaintiff at the watch in the engine room.

The defendant introduced evidence of physicians and some records. The record and deposition disclose that the plaintiff was an ambulant patient at Galveston, that is, that he was not confined to his bed. There is also evidence introduced by the defendant that he went to his meals, and that he was treated for jaundice at Galveston Marine Hospital, that he was circumcised there, that an X-ray was taken at Galveston before he was discharged, that the X-ray was negative, that there was no tenderness to touch, that there [fol. 413] was no pain, and that the plaintiff was discharged as recovered and fit for work.

You have heard the deposition read of Dr. Flurry. You have had the deposition read to you of the physician at Houston in which he said that he did strap the plaintiff's back, that the plaintiff did receive therapeutic oil massage, oil treatment, violet ray and heat treatment. You have heard the testimony as to the treatment he received here at the Hudson Street Marine Hospital where he also received therapeutic treatment, if I remember rightly, and that while at the Hudson Street Hospital there was made for him a sacroiliac belt which the plaintiff wore on the day of the trial and has worn ever since it was made for him at the Hudson Street Marine Hospital.

Gentlemen, the duty of the defendant was to furnish to plaintiff a safe place in which to work. It was the duty of the defendant to maintain such place and appliances in a safe condition. If the defendant has done so, if the place in which the plaintiff was asked to work was safe, if its appliances were safe, if they were maintained in good repair and good order, and if there was no other negligence shown on the part of the defendant, then, gentlemen, the injuries which he undoubtedly sustained were sustained without any fault on the part of the defendant. And if there was no fault on the part of the defendant, if the defendant did all that it was in duty or by law bound to do for the plaintiff in giving him a safe place in which to work and safe tools with

which to work and any injuries were sustained by the plain-
[fol. 414] tiff, then certainly there is no reason why the defendant should be held liable. If it has done its full duty and it was not negligent in any regard with reference to the plaintiff there is no reason why the defendant should be held liable.

If, on the other hand, it failed in that duty then it must respond in damages if such failure was a proximate cause of the injuries sustained by the plaintiff.

Gentlemen, according to the theory of the case as I understand it, you will have to decide the fact whether or not there was a bracket, whether or not the bracket came loose, whether it was out of repair, whether the defendant kept it repaired, whether the plaintiff's striking such bracket out of repair caused him to lose his balance, and whether that caused the injuries. It is for you to determine what the facts were—whether it was purely an accident, whether the step was all right, and whether the defendant was without fault on its part.

The plaintiff must prove his cause of action by a preponderance of the evidence. If the evidence is evenly divided as to whether the defendant failed in its duty toward the plaintiff, then your verdict must be for the defendant. If the preponderance of the evidence is with the defendant, your verdict must be for the defendant. If, however, the evidence preponderates, no matter how slightly, in favor of the plaintiff, then as to these matters your verdict should be for the plaintiff on the first cause of action.

By preponderance of the evidence the court does not refer to the number of witnesses, but rather to the quality of the evidence.

Gentlemen, if you find that the defendant failed in any
[fol. 415] duty that it owed to the plaintiff then your verdict should be for the plaintiff. If he is entitled to recover you may take into consideration the injuries which the plaintiff sustained, the nature of those injuries and whether or not any of those injuries will be permanent. You may take into consideration the money that he spent in an effort to be cured and the money that is yet to be spent to be cured. You may take into consideration the earnings which he has lost through the injury. You may take into consideration the earnings which he will lose in the future by reason of such injuries. You may take into consideration the pain which he has suffered, and if you believe it, the pain which

he is now suffering and which he is yet to suffer in this connection.

I forgot to tell the jury that the plaintiff's witness, his own doctor, called by the plaintiff, testified that he saw two scars on the plaintiff's back. There is no doubt of the injury to the back. He found that the plaintiff has recovered greatly, that he can move in every direction except touch the floor in bending, that he could come to within only an inch or so of the floor with his fingers in bending. He also found that he could do light work. There is no testimony as to whether he could do the work of an oiler or not.

Gentlemen, if you find that the plaintiff is entitled to recover you may consider the injuries he sustained in the manner in which I told you. But before you go a step further you must determine whether the injuries were sustained solely through the negligence of the defendant or whether the plaintiff also was negligent. On this score I [fol. 416] charge you, gentlemen, that after you determine the amount of damages which he has sustained then if plaintiff's negligence, as well as the defendant's negligence, contributed to those injuries you must deduct from that amount a sum in proportion to the extent that plaintiff's own negligence has contributed to the injuries. In other words, the rule applied then is what is known as the comparative negligence rule and not the contributory negligence rule. In the State court under the State rule if a plaintiff is negligent at all he cannot recover. In this case the rule is that if the negligence of both plaintiff and defendant contributed to the injury then plaintiff's damage must be reduced in the proportion that his own negligence contributed to the injury. For instance, if you find that the plaintiff and the defendant were equally negligent then both must stand one-half of the damage. The plaintiff can only recover one-half of the damages he sustained. If you find that the plaintiff was twice as negligent as the defendant then he can only recover one-third of the damages that he sustained. If you find that the defendant was twice as negligent as the plaintiff then the defendant must stand two-thirds and the plaintiff one-third.

The law applicable to this case is that whether the plaintiff was negligent or not, or whether the defendant was negligent or not, if a seaman sustains injuries aboard ship the owner of the ship must maintain for a reasonable time while he is seeking a cure and pay the expenses of a cure.

The owner must pay the expenses of maintenance and cure for a reasonable time during which he is seeking a cure. But, [fol. 417] gentlemen, that does not mean that he must maintain him for the rest of his life; it is only for a reasonable time while seeking the best cure possible under the circumstances. After he has received the best cure possible the obligation to pay the expense for maintenance and cure ceases.

If you find that when he left Galveston he was discharged as recovered and was fit for duty and able to do his work, then the obligation on the part of the defendant was to pay all expenses that he incurred for maintenance and cure up to that time. Up to that time he was maintained in public hospitals except as to small items of expense. If you believe, gentlemen, that when he was discharged, no matter what the certificate states, he had not recovered as fully as he could with medical assistance, or if you find that he was not fit for duty, then you can allow him for maintenance and cure for a reasonable time or until such time as he received the best cure possible.

I think he himself testified that he went to see Dr. Young in January, 1936, and was told that nothing further could be done for him. If you believe that that is so, then certainly the obligation of the defendant to maintain and cure him terminated when nothing more could be done for him. The obligation was only to maintain and cure him for a reasonable time while seeking a cure.

Gentlemen, certainly if the defendant was negligent, then to the extent that its negligence was the proximate cause of the injury, the defendant should be held responsible. If the plaintiff fell without any fault on the part of the defendant, causing the fall or the injury, then there is no [fol. 418] reason why the defendant should be held liable otherwise than for maintenance and cure under the instructions I have given you. If you find that the injuries were sustained solely through the negligence of the defendant then the defendant ought to stand all the damages. If you find that the negligence or both contributed to it then they should be apportioned in the manner in which I told you. If you find that the plaintiff is entitled to your verdict on the first cause of action and you are allowing him in the first cause of action for the expenses and money

he paid out to obtain a cure and to maintain himself, why, then you can't allow it in the second cause of action. On the second cause of action you may allow the plaintiff expenses for maintenance and cure, but excluding anything that you may include in your first cause of action on account thereof.

You have heard a great many rulings made in the case. You are not to draw any inferences from those rulings. You are not to infer anything adverse to either the plaintiff or the defendant. They were purely on questions of law. You are not to infer anything for or against the plaintiff or the defendant by reason of any ruling made by me. I did not thereby express my belief as to whether or not the plaintiff or the defendant or either was negligent.

Any further requests?

REQUESTS TO CHARGE

Mr. Potter: Your Honor, I have just the one request that I alluded to before your Honor charged the jury.

The Court: Just the one?

Mr. Potter: The one at the top of the page. I ask your Honor to charge that Dr. Flurry, the doctor at the United [fol. 419] States Marine Hospital at Galveston, that Mr. Robertson——

Mr. Engelman: Just a minute, your Honor. Would your Honor mind reading the request?

The Court: Have you finished your request?

Mr. Potter: No, sir.

The Court: Let him finish his request.

Mr. Engelman: This is a violation of the rules of court in that I was told that the requests were to be submitted to you in writing.

The Court: The rule of law is that the requests are to be submitted in writing before the court instructs the jury, but I know of no law which in view of what the court has charged forbids the supplementing of written request by verbal requests. It is done in every case if necessary in the interest of justice.

Mr. Potter: I ask your Honor to charge the jury that Dr. Flurry, the doctor at the U. S. Marine Hospital at Gal-

veston, Texas, that Mr. Robertson, the third assistant engineer, and that Mr. Hamilton, the oiler, are all disinterested witnesses.

The Court: I will so charge.

Mr. Potter: I ask your Honor to charge the jury——

The Court: I will modify that charge. Gentlemen, it is for you to say what if any interest any witness has. There was no direct evidence of any interest of any of these three witnesses.

Mr. Potter: I ask your Honor to charge that if they believe that Mr. Smith, the plaintiff, could have felt the bearing while standing with both of his feet on the floor plate and that it was not necessary for him to stand up on the [fol. 420] step plate, he assumed the risk of any injury he may have sustained.

The Court: I refuse so to charge.

Gentlemen, I charge you now that the ship owner is under a duty to furnish a seaman with a safe place in which to work, give him safe appliances and safe tools, and that is his duty. There is no contributory negligence or assumption of risk on the part of a plaintiff in so far as the defendant fails in these duties.

Mr. Potter: May I have an exception, sir?

The Court: Exception.

Mr. Potter: As to the first cause of action, I ask your Honor to charge the jury that the mere happening of an accident aboard ship does not make the ship or the ship owner liable for indemnity based on negligence.

The Court: Gentlemen, the court so charges. It must be evident to you gentlemen that it would be inconsistent with your oath if you found a verdict against the defendant unless you found that the defendant failed in its duty in some respect toward this plaintiff. I will put it this way: There is no reason why the defendant should pay any damages for injuries sustained by a seaman or by anyone else unless those damages were sustained through its negligence. In other words, neither the ship owner nor the ship is responsible for the happening of a mere accident or if the damage was sustained through the sole negligence of the plaintiff. It should only be held responsible if it failed in any duty and to the extent in which it failed in that duty.

Are there any further requests?

Mr. Engelman: There are no further requests?

[fols. 421-431] The Court: Any further requests from you?

Mr. Potter: No, sir, your Honor.

The Court: Are there any exceptions by either the plaintiff or defendant to any part of the charge?

Mr. Engelman: My only exception, which possibly is not an exception, is this: I thought the court did not make sufficiently clear the maintenance and cure feature of the case. I except to the court's charge on maintenance and cure in that the court failed to state that the duty to furnish maintenance and cure is owing by the defendant to the plaintiff irrespective of negligence and merely by the happening of the accident until the cure is as complete as medicine and physicians can make it.

The Court: Gentlemen, I thought I charged that as plainly as possible. If a seaman is injured aboard a ship he is entitled to maintenance and cure irrespective of whether he sustains his injuries through a pure accident or through his negligence or through the ship's negligence. The ship and the owner of the ship are responsible for maintenance and cure to the extent that I have indicated, for a reasonable time within which to obtain a cure or until the best cure possible under the circumstances has been obtained.

(Discussion off the record.)

(The jury retired.)

(Recess until 3:00 p. m.)

* * * * * * * *

[fol. 432] (The jury returned to the courtroom.)

[fol. 433] The Clerk: Have you agreed upon a verdict, Mr. Foreman?

The Foreman: Yes, sir.

The Clerk: How say you?

VERDICT

The Foreman: We, the jury, find for the plaintiff in the amount of $5,000 on the first cause of action, and we, the jury, find for the plaintiff in the amount of $535 for maintenance and cure.

The Clerk: Listen to your verdict as it stands recorded: We, the jury, find for the plaintiff in the amount of $5,000 in the first cause of action, and we, the jury, find for the plaintiff in the sum of $535 for maintenance and cure, and so say you all.

The Foreman: Yes.

Motion for New Trial

Mr. Potter: The defendant now moves to set aside both verdicts and for a new trial on both of the causes of action on the ground that the verdicts are against the evidence, against the weight of the evidence, contrary to law, and on all the grounds enumerated in Section 549 of the Civil Practice Act, except insufficient damages.

The Court: Motion denied.

Mr. Potter: And may I have an exception, sir.

I take it you don't care to hear any argument now.

The Court: There was a question of fact and the jury has resolved it. I believe there was a question of fact.

Mr. Potter: May I have an exception, sir.

May I have thirty and sixty days?

The Court: I think the law fixes the time in this court. I will give it to you if necessary, but I think the law gives it to you.

Gentlemen, the court thanks the jurors for the attention they gave to this case.

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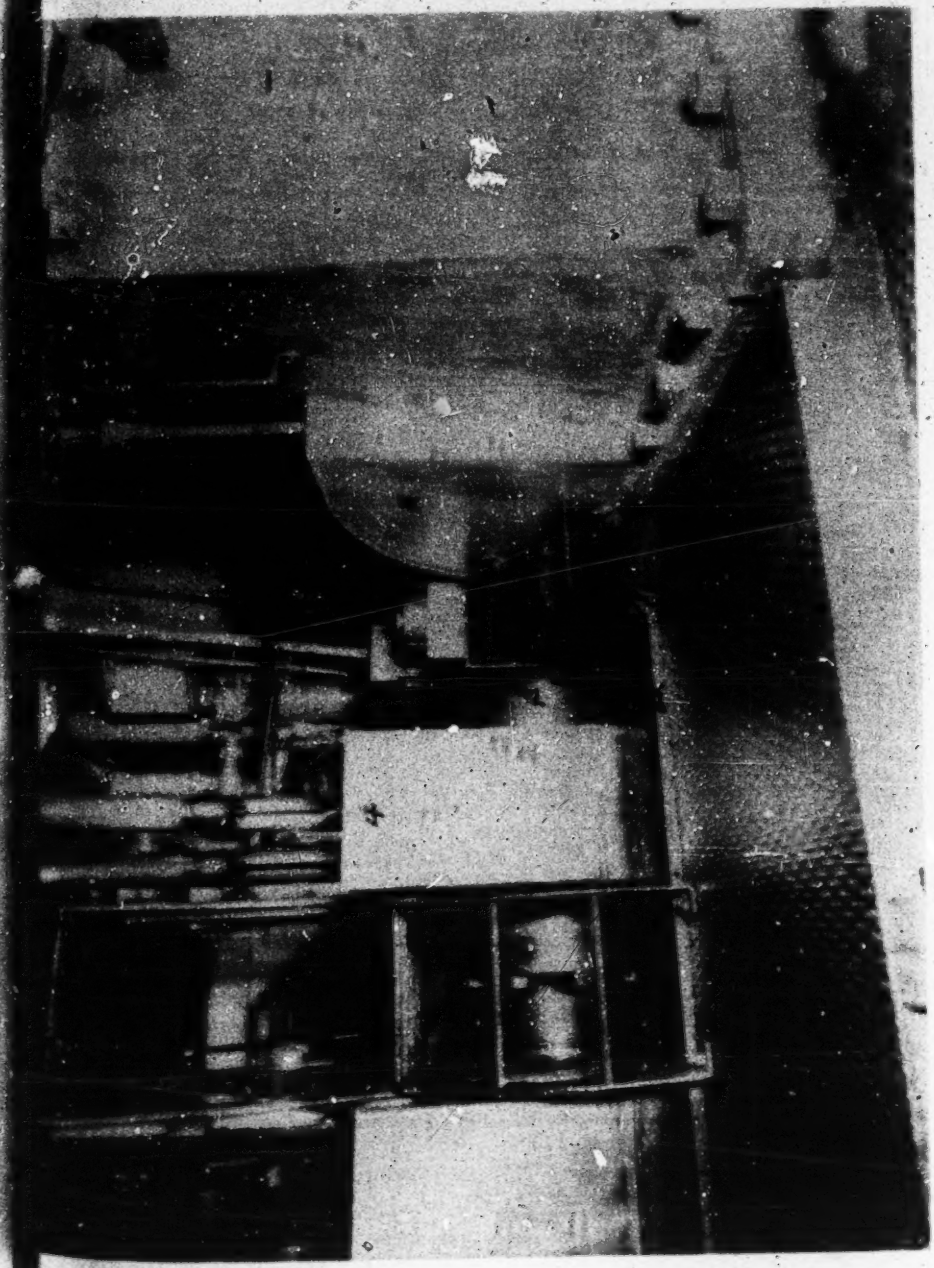
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PLAINTIFF'S EXHIBIT No. 1



436

PLAINTIFF'S EXHIBIT No. 2



437

PLAINTIFF'S EXHIBIT No. 3

Form E. Y. 72

REPORT OF ILLNESS, INJURY, MEDICAL ATTENDANCE OR DEATH

NO.
REC'D
RECORD

BROADWAY
NEW YORK

THIS REPORT MUST BE CAREFULLY PREPARED IN EVERY CASE OF ILLNESS, INJURY OR DEATH, AND PROMPTLY FORWARDED TO NEW YORK OFFICE.

PERSON CONCERNED: Name in Full Herbert Augustus Smith Jr. Rating Oiler
Vessel S.S. Wm. Penn Owned by Atlantic Refining Co.
Address 3145 Mitchell Ave Philadelphia Pa. Nationality U.S.A.
Age 31 Married Yes For Voyage to Round trip
Signed on at Philadelphia, Date April 24 Voyage Started April 24 1935
Signed off at Philadelphia Date June 4/35 Last Day Paid June 4/35
Ended at Philadelphia Date June 4/35
Entered Service Feb. 2 1934

EXACT TIME AND DATE OF ILLNESS, INJURY OR DEATH? (Give Vessel's Location) 5:30 P.M. June 2nd 1935 — Off Florida Keys —

NATURE OF ILLNESS OR INJURY? Abrasion of back and injured left index finger.

DESCRIBE ACCIDENT FULLY? (Name Gears Done and Machinery or Gear in Use) While reading of the after side of the S.S. Journal — stepped down and tripped on the plate gratchet which was loose and out of place

CAUSE? (What Should Be Done to Prevent Recurrence?)

WHERE ON SHIP DID ACCIDENT occur? (Attach Sketch) Between S.S. Journal and Lp. cer - estate

WAS INJURED PERSON CARELESS? (If so, in What Way?) not determined

WAS ANY OTHER PERSON AT FAULT? (In What Way?)

WHAT MEDICAL TREATMENT GIVEN? (If Sent to Hospital, Give Name, Address, Date) Claims none

DID OR WILL ILL OR INJURED PERSON LOSE TIME? Lost No time on pay — 3 watches Lost Remainder

NAMES, RATINGS AND ADDRESSES OF ALL WITNESSES? Robert Swisher — 1st Asst. S.S. Yankee Arrow
S. Fatherree — Fireman, 1st Rdesy.

IMPORTANT

ATTACH TO THIS REPORT FULL AND COMPLETE SIGNED STATEMENT OF:

1. Injured Person 2. Chief Officer and or Chief Engineer 3. All Witnesses

SIGNED R. E. Little
Dist. Supt. and Mate

DATE June 4/1935

Robert X Swisher Witness

250

438-474

DEFENDANT'S EXHIBIT A .

6/10

REPORT OF ILLNESS, INJURY, MEDICAL ATTENDANCE OR DEATH

FORM P.S. 72

NO. 44

REC'D

RECORD

THIS REPORT MUST BE CAREFULLY PREPARED IN EVERY CASE OF ILLNESS, INJURY OR DEATH AND PROMPTLY FORWARDED TO NEW YORK OFFICE.

1. PERSON CONCERNED: NAME IN FULL Herbert Augustus Smith jr. RATING Oiler WAGES $72.50
VESSEL 85 Yankee Arrow NUMBER 308 Maine Ave Greenwood, Rhode Island
AGE 21 MARRIED Yes NATIONALITY American
SIGNED ON AT Baltimore DATE May 27th FOR VOYAGE TO Beaumont, Texas and Quincy, Mass
SIGNED OFF AT Beaumont DATE June 4th-35 VOYAGE STARTED Baltimore, Md
SIGNED AT DATE LAST DAY PAID June 4th 1935
ENTERED SERVICE Feb. 2nd 1934

2. EXACT TIME AND DATE OF ILLNESS, INJURY OR DEATH? 5:30 PM June 2nd 1935

(Give Vessel's Location) Off Florida Keys

3. NATURE OF ILLNESS OR INJURY? Abrasions on right hip and back, also bruise [illegible] on left index finger

4. DESCRIBE ACCIDENT FULLY? (Name Name Name and Machinery or Gear in Use) While falling Number 4 mains bearing, he slipped on floor plates, falling between No. 4 main bearing and L.P. eccentric, a distance of approximately two feet.

5. CAUSE? (What Should Be Done to Prevent Recurrence?)

6. WHERE ON SHIP DID ACCIDENT OCCUR? (Attach Sketch) Between No. 4 main bearing and L.P. eccentric (Engine Room)

7. WAS INJURED PERSON CARELESS? (If so, in What Way?) WAS ANY OTHER PERSON AT FAULT? (In What Way?)

8. WHAT MEDICAL TREATMENT GIVEN? Treated with unguentine and bandaged (If Sent to Hospital Give Name, Address, Date)

9. DID OR WILL ILL OR INJURED PERSON LOSE TIME? E. Latierre, fireman, 25 East 64th st., new york

10. NAMES, RATINGS AND ADDRESSES OF ALL WITNESSES? Robert L. Turner first assistant engineer, 817 North Blacksmith street, Raleigh, North Carolina

IMPORTANT

ATTACH TO THIS REPORT FULL AND COMPLETE

SIGNED STATEMENT OF: 1. INJURED PERSON

SIGNED ..... (MASTER OR OWNER)

DATE 6/10/35

CHIEF OFFICER AND/OR CHIEF ENGINEER

2. ALL WITNESSES

R. L. Turner
1st Asst. Engineer



DEFENDANT'S EXHIBIT E

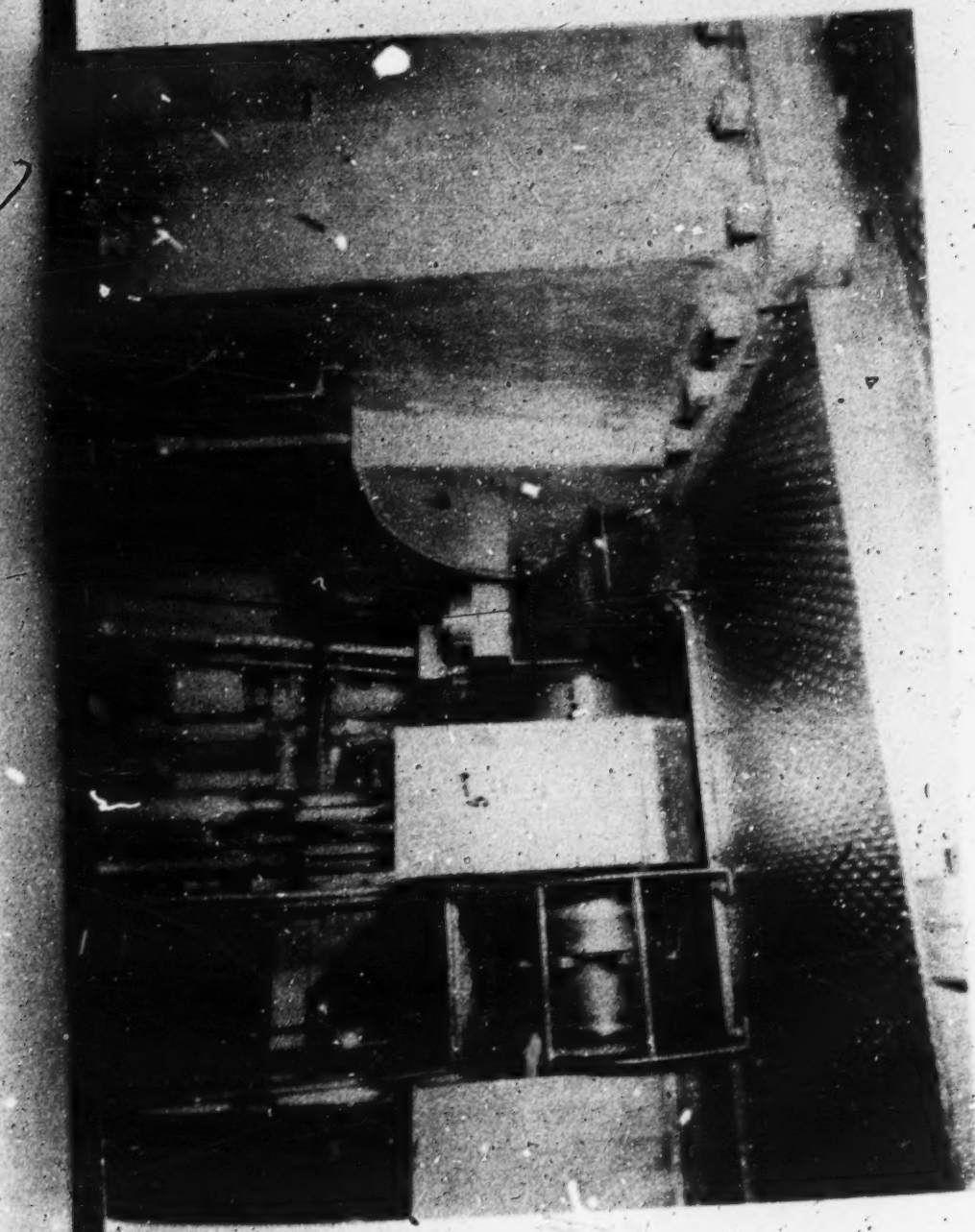
251

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DATE 1933	NAME	RATING	DESCRIPTION OF CASE AND LOCATION OF VESSEL	HOME	TREATMENT	DISPOSITION
June 2nd	M.A. Smith	Oiler	Abrasions on right hip and back; also bruised knuckle on left index finger - Claims that while feeling fd main bearing he slipped on floor plates, falling between fd main bearing and L.P.eccentric, a distance of approximately two feet. (Off Florida Keys		Treated with Unguentine and bandaged. Examined by doctor at Beaumont, Texas	Paid off at Beaumont, Tex. 6/4/33

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DEFENDANT'S EXHIBIT J



[fol. 477] IN UNITED STATES DISTRICT COURT

STIPULATION AND ORDER SETTLING BILL OF EXCEPTIONS

It is hereby stipulated and agreed by and between the attorneys for the respective parties that the foregoing contains all the testimony taken upon the trial of the action, and that the same may be settled and allowed in the form proposed and submitted, and ordered on file as the bill of exceptions herein.

Dated, New York, September —, 1937.

George J. Engelman, Attorney for Plaintiff. Louis Mead Treadwell, Attorney for Defendant.

Upon the foregoing stipulation of the attorneys for the respective parties hereto, it is hereby

Ordered, that the foregoing be settled and allowed and filed as the bill of exceptions herein.

Dated, New York, September —, 1937.

William Bondy, U. S. District Judge.

[fol. 478] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

PETITION FOR APPEAL

To the Honorable Judges of the United States District Court for the Southern District of New York:

The above-named defendant, Socony Vacuum Oil Company, Incorporated, feeling aggrieved by the judgment of the District Court of the United States for the Southern District of New York, entered herein on the 22nd day of June, 1937, hereby appeals from said judgment to the United States Circuit Court of Appeals for the Second Circuit, and prays that said appeal be allowed for the reasons specified in the assignment of errors filed with this petition, and also prays for an order allowing petitioner to prosecute said appeal, and that a transcript of the record, papers and proceedings on which the said judgment was made, may be duly

authenticated and sent to the United States Circuit Court of Appeals for the Second Circuit; and that a citation be issued as directed by law.

Dated, New York, July 30th, 1937.

Louis Mead Treadwell, Attorney for Petitioner-Defendant, 26 Broadway, New York, N. Y.

[fol. 479] ALLOWANCE OF APPEAL

The above appeal is hereby allowed.

Dated, New York, July 30th, 1937.

William Bondy, U. S. D. J.

IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

ASSIGNMENT OF ERRORS

Comes now the said Socony-Vacuum Oil Company, Incorporated, defendant in the above entitled cause, and files the following assignment of errors upon which it will rely in the prosecution of an appeal herewith petitioned for in said cause, from the judgment of this Court entered on the 22nd day of June, 1937.

1. The Court erred in entering judgment against defendant.

[fol. 480] 2. The Court erred in denying defendant's motions to dismiss the complaint as to the "First" and "Third" causes of action.

3. The verdict returned is contrary to the evidence submitted on the trial of the said cause and is not supported by it.

4. The judgment entered on the verdict is contrary to the evidence submitted upon the trial and is erroneous in law.

5. The Court erred in denying defendant's motion to set aside the verdict in favor of the plaintiff, on the ground that it was contrary to law.

6. The Court erred in denying defendant's motion to set aside the verdict in favor of the plaintiff, on the ground that it was contrary to the evidence.

7. The Court erred in denying defendant's motion to set aside the verdict in favor of the plaintiff on the ground that it was contrary to the weight of evidence.

8. The Court erred in admitting evidence of the witness Dr. Hodgskin on behalf of the plaintiff.

9. The Court erred in admitting in evidence the medical testimony offered by the plaintiff.

10. The Court erred in over-ruling objections by the de-
[fol. 481] fendant and admitting in evidence testimony offered by the plaintiff on rebuttal as follows:

"Q. Will you tell us, Mr. Liverpool, whether it is customary and usual practice in the American merchant marine for the engineers to instruct the oilers as to the manner in which bearings are to be felt?

"A. Yes, sir."

11. The Court erred in over-ruling objections by the defendant and admitting in evidence testimony offered by the plaintiff on rebuttal as follows:

"Q. Mr. Liverpool; I show you Defendant's Exhibit J. Let us say that where the figure 2 appears on that photograph that that is a support which goes around the bearing and that where the figure 8 appears is the edge of the bearing and that where this line is drawn that I am indicating directly below the figure 8, that the bearing extends from one end of that line to the other, and that on Plaintiff's Exhibit No. 1 where the figure 3 appears there is an opening or well about 8 inches in depth, and that feeling down into the bottom of that well you can feel the crankshaft and the bearing. Now, assuming those facts to be true, can you express an opinion with reasonable certainty at what particular point on Defendant's Exhibit J an oiler in the course of his duties would feel that bearing illustrated by the line on Defendant's Exhibit J?

[fol. 482] Mr. Potter: That is objected to.

The Court: Do you understand the question?

The Witness: Yes, sir.

Mr. Potter: That is objected to on the ground, first, that it is not rebuttal. Secondly, I object to it on the ground that it is not relevant and not material. Thirdly, I object to it on the ground that the witness has not been qualified. Fourth, I object to it on the ground that the witness is now shown photographs and asked a hypothetical question concerning those photographs and is asked a question which has absolutely no relevancy to the issue now on trial.

. . . . . .

Mr. Potter: I object to his testimony if he has never been on board the Yankee Arrow, and he has not been.

. . . . . .

Q. You are not to assume what he wanted you to answer. You are not here to answer questions on his assumption as to how he wants them answered. You are under oath to express your best opinion.

A. I can just give you my best opinion as to how I would do it.

Q. What would you do?

A. Feel the bearing on both sides and the center.

Q. What did he ask you?

A. That is the way I understood the question.

Q. What did he ask you? I ask you whether you understood the question.

A. This is the line. That is where the bearing is. Down [fol. 483] in here and down in there is about where I would feel that engine."

12. The Court erred in refusing to grant defendant's motion to strike out testimony of the witness Liverpool on rebuttal as follows:

"Q. Now, he wants to find out whether the bearing becomes heated or not, what part of the journal or the bearing or the shaft you would feel.

The Court. Is that what you wanted to know?

Mr. Engelman: Yes.

A. The closest point you can come to the turning surface is the place. If you can touch the turning surface that is the proper place.

Q. You would advise touching the turning surface?

A. Yes.
Q. And the turning surface is the shaft?
A. Yes.
Q. You would advise touching the turning surface?
A. Yes, I would instruct my oiler to do that."

13. The Court erred in over-ruling objections by the defendant and admitting in evidence testimony on rebuttal as follows:

"Q. Now, looking at these two photographs, Defendant's Exhibit J and Plaintiff's Exhibit No. 1, can you tell us or illustrate on those photographs the particular point at which the bearing should be felt?

[fol. 484] Mr. Potter: That is objected to.
The Court: He said he would not feel the bearing. He said he would feel the shaft. Isn't that what you said?
The Witness: Yes, sir, I would feel the moving part if I can.

Q. And at what point would you feel that?
A. Right through that hole.

By the Court:

Q. Where?
A. Through the hole in the cap of the bearing (indicating).
Q. You would put your hand through that hole to feel the bearing?
A. Yes.
Q. To feel the shaft?
A. Yes, sir, to feel if it is warm.

14. The Court erred in admitting in evidence a certain paper or document claimed to have been signed by the Third Mate, Little, and claimed to have been given by him to the plaintiff.

15. The Court erred in refusing to admit in evidence the Engineer's Rough Log marked Defendant's Exhibit G for identification.

16. The Court erred in refusing to admit in evidence the Engineer's Smooth Log marked Defendant's Exhibit H for identification.

17. The Court erred in sustaining the plaintiff's objections to questions propounded by the defendant and excluding evidence as follows:

[fol. 485] (a) "From your examination of the X-rays were you able to form an opinion as to whether he has sustained any injury to the back?

"A. Yes.

"Q. Tell us, if you will, please, what that opinion was."

(b) "Q. In your opinion was he at that time in fit physical condition to perform the work of an oiler or seaman?"

(c) "Q. Doctor, don't you think that the doctors who had Smith under observation for a month at the Marine Hospital, of course, would be better qualified to testify as to his progress under treatment and the exact extent of his disability?"

(d) "Q. Doctor Moore, if this man was examined on July 13th, at the Marine Hospital where he had been under observation for a period of over a month and they found no limitation in motion, no extension, or any evidence of injury to the spine, and when an X-ray had been taken showing no injury to the spine, and on the 13th he was discharged fit for duty, in your opinion, do you think that the Marine Hospital would be in better position to judge about that question of disability than yourself who only saw him on three different occasions?"

(e) "Q. Have you ever taken hold of the grab-rail shown in that photograph?

"A. I have taken hold of the rail on that Yankee Arrow and felt that bearing myself.

[fol. 486] "Q. And where were your feet at the time you did so?

"A. Both on the floor plate, right here (indicating).

"Q. And as you felt the bearing was it necessary for you to stand upon the step plate shown in that photograph?"

(f) "Q. It has been testified here by the plaintiff that just before he fell he had his right foot on the step plate and his left foot on the bed plate and his left hand on the

top of the guard plate and was feeling the bearing with his right hand: Is that in your opinion a proper and usual way to feel that bearing?"

(g) "Q. Is it possible to stand with your left hand holding this guard plate, grasping it with the left hand and feeling the bearing with your right hand when standing with both feet on the floor plate?"

(h) "Q. Is it possible to stand with both feet on the floor plate grasping the grab or hand rail with your right hand and feeling the bearing with your left hand while both feet remain upon the floor plate?"

18. The Court erred in refusing to charge the jury as follows:

(a) "Mr. Potter: I ask your Honor to charge the jury that Dr. Flurry, the doctor at the U. S. Marine Hospital at Galveston, Texas, that Mr. Robinson, a third assistant engineer, and that Mr. Hamilton, the oiler, are all disinterested witnesses."

[fol. 487] (b) "Mr. Potter: I ask your Honor to charge the jury that if they believe that Mr. Smith, the plaintiff, could have felt the bearing while standing with both of his feet on the floor plate and that it was not necessary for him to stand up on the step plate, he assumed the risk of any injury he may have sustained.

Wherefore, defendant prays that the judgment of the United States District Court for the Southern District of New York in said cause be reversed.

Dated, New York, July 30th, 1937.

Louis Mead Treadwell, Attorney for Defendant, No. 26 Broadway, New York, N. Y.

NOTE AS TO BOND AND CITATION

A bond in the usual form was duly approved and filed and a citation in the usual form duly issued and served.

[fol. 488] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AND ORDER AS TO CERTAIN EXHIBITS

It is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto that the appellant's Exhibits "C" and "D" (the deck logs of the S.S. "Yankee Arrow") and Exhibit I (Model) need not be printed or reproduced in this Transcript of Record, but the same may be referred to on the argument of the appeal by either party and may be submitted to this Court with the same force and effect as if printed.

Dated, New York, September 1st, 1937.

Louis Mead Treadwell, Attorney for Defendant-Appellant. George J. Engelman, Attorney for Plaintiff-Appellee.

So ordered. Manton, U. S. C. J.

[fol. 489] IN UNITED STATES DISTRICT COURT, SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

STIPULATION AS TO RECORD

It is hereby stipulated and agreed, that the foregoing is a true transcript of the record of the said District Court in the above-entitled matter as agreed on by the parties.

Dated, September —, 1937.

George J. Engelman, Attorney for Plaintiff. Louis Mead Treadwell, Attorney for Defendant.

[fol. 490] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 491] UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

HERBERT A. SMITH, JR., Plaintiff-Appellee,

against

SOCONY VACUUM OIL COMPANY, INC., Defendant-Appellant

Before Manton, Augustus N. Hand and Chase, Circuit Judges

Appeal from United States District Court for the Southern District of New York

Action brought by the plaintiff Herbert A. Smith, Jr., upon two counts (1) to recover damages under the Jones Act for injuries suffered during the course of his employment as an oiler on board the defendant's S. S. "Yankee Arrow" because of a defective appliance, (2) to recover for maintenance and cure. From a judgment entered (a) upon a verdict for $5,000 rendered on the first count, and (b) upon a verdict for $535 rendered on the second count, amounting with interest and costs to $5,578.39, the defendant appeals.

Louis Mead Treadwell, Attorney for Defendant-Appellant; Henry B. Potter, Counsel.

George J. Engelman, Attorney and counsel for Plaintiff-Appellee.

[fol. 492] AUGUSTUS N. HAND, Circuit Judge:

This is an appeal by the defendant from a judgment in an action by the plaintiff to recover damages (1) under the Jones Act based on alleged negligence, and (2) to recover for maintenance and cure.

Plaintiff was an oiler working in the engine-room of defendant's ship. It was a part of his duty to determine from time to time whether the low pressure bearing and journal of the engine required lubrication. In doing this he was accustomed to examine the low pressure journal about once every twenty minutes in order to discover by touch whether it was getting too hot. In the course of the inspection he would also look at the color of the oil that had come off on his fingers because the color would indicate whether the journal was beginning to gripe owing to excessive friction. Both the color of the oil and the heat of the journal would

determine whether there was need of more lubrication. In order to reach the journal he placed his right foot on a step above the floor of the engine-room, placed his left foot on the crank-frame to which the step was attached and held on to the slush pan with his left hand while with his right hand he reached down to feel the journal and determine whether it was over-heated. In attempting to resume his position on the floor of the engine-room he started to bring down his left foot. This, he said, caught on a bracket which had got out of repair and had swung loose from the step which it was designed in part to support. The catching of his leg in the loose bracket caused him to tumble and is said to have resulted in injuries for which he sought to [fol. 493] recover damages in the present action.

The plaintiff testified that he had informed the first assistant engineer of the defective condition of the bracket some two or three weeks before the time of the accident. It is an inference from the plaintiff's version of the case that he attempted to inspect the journal in the only way practicable. He said in substance that if he had stood on the floor of the engine-room while reaching to feel the journal he would have been in danger of falling into the opening adjacent to the journal because he could not reach the grab iron with his right hand to support himself while making the inspection.

The foregoing is believed to set forth the essentials of the plaintiff's story and to have been the basis for the recovery of $5,000 allowed by the jury upon the first count of the complaint for the injuries resulting from negligence, and for the recovery of $535 allowed by the jury under the second count for maintenance and cure. From the judgment for $5,578.39 entered on the verdict for the above two items the defendant appeals.

A number of witnesses called for the defendant testified that the step had never had a supporting bracket and there *there* was nothing defective about it; that the plaintiff could feel of the journal and determine whether it needed lubrication while standing with both feet on the floor of the engine-room and that the step, which was ten inches above the floor, was not designed for use while the vessel was at sea, but only for use in port while repairs were being made. There was also testimony by the first assistant engineer that he never saw the plaintiff or any of the other oilers standing on the step to feel the bearing, and that it would be dar-

[fol. 494] gerous to do so. There was also testimony by the first assistant engineer that he had seen the plaintiff feel the journal while having both his feet on the floor plate and his right hand on the guard rail. Although plaintiff's story is not supported by as much testimony as defendants, we do not regard it as too inherently improbable for submission to the jury.

Defendant's principal contention on this appeal is, that even if there was a defective bracket below the step and it swung out of place, caught plaintiff's leg as he stepped down and caused him to tumble, yet in performing his task he had a choice of methods—one the safe method of standing on the floor of the engine-room and supporting himself by the guard rail (as he leaned forward) and the other the dangerous and really inconvenient method of climbing up on the step and reaching down with the chance that he might encounter the defective bracket when he returned to the floor. Because the above choice was available and no one ever directed the plaintiff to inspect the journal by using the step, defendant argues that when he chose the unsafe course, he must be regarded as having assumed the risk incident to the method he adopted. This point was sharply raised by the refusal of the trial judge to recognize assumption of risk as a defense under any circumstances. He left to the jury only the question of negligence and contributory negligence and refused defendants' request to charge that if they believed that "the plaintiff could have felt the bearing while standing with both of his feet on the floor plate and that it was not necessary for him to stand upon the step plate, he assumed the risk of any injury he may have sustained." The judge, after saying: "I refuse so to charge", immediately added: "Gentlemen I charge you now that the ship [fol. 495] owner is under a duty to furnish a seaman with a safe place to work, give him safe appliances and safe tools, and that is his duty. There is no contributory negligence or assumption of risk on the part of the plaintiff in so far as the defendant fails in these duties." The defendant's counsel excepted.

In the recent case of The Arizona v. Anelich, 298 U. S. 110, the question before the Supreme Court was whether a cause of action prosecuted under the Jones Act by the representative of a deceased seaman and arising from death of the seaman attributed to a defective appliance for stopping a winch, was subject to the defense of assumption of risk.

Justice Stone, who wrote the opinion, stated that the Jones Act brought into the maritime law, as theretofore existing, new remedies, such as recovery by employees from shipowners for negligence, in spite of the contributory negligence of the former, but with apportionment of damages between employer and employee. He went on to say that the purpose of the Jones Act was to enlarge rather than to narrow the protection given seamen by the maritime law and remarked that no American case appears to have recognized "assumption of risk as a defense to such a suit" under the maritime law. He concluded his opinion by saying: "No provision of the Jones Act is inconsistent with the admiralty rule as to assumption of risk. The purpose and terms of the Act and the nature of the juristic field in which it is to be applied, preclude the assumption that Congress intended, by its adoption, to modify that rule by implication". For the above reasons it was held by the Supreme Court that the defense of assumption of risk was not a bar to recovery for the injuries suffered by the seaman through the defective [fol. 496] appliance. This holding was reiterated in Beadle v. Spencer, 298 U. S. 124, in the case of a seaman engaged in unloading lumber from his vessel while in port. In Beadle v. Spencer, 298 U. S. at p. 129, Justice Stone said that it made no difference whether the vessel was in port or at sea and that the circumstance that she was in port afforded no ground for relaxing the admiralty rule "applicable under the Jones Act, that assumption of risk is not a defense to a suit to recover for injury to a seaman resulting from unseaworthiness or defective equipment, because he chances to be in some measure less amenable to the iron discipline of the sea than others who go upon foreign voyages. Even so his freedom to avoid the risk is far from comparable to that of the employee on land where the defense of assumption of risk originated and has been maintained. No such distinction appears to have been recognized in the maritime law."

It is true that the above decisions of the Supreme Court were not rendered in cases where the seaman had a choice of places within which to work or of equipment for use in his work. At least the court discussed no such question. But the language in both opinions is general and sweeping and seems to preclude assumption of risk as a defense to an action by a seaman who seeks to obtain indemnity under the maritime law or under the Jones Act for injuries arising

from a defective appliance or from unsafe working conditions. In view of the language of the Supreme Court in the foregoing cases, the decisions which have allowed the defense of assumption of risk, in actions under the Jones Act even where the injury arose from a defective appliance or an unsafe place to work provided the seaman could have [fol. 497] chosen a safe appliance or place to work, instead of the one selected, cannot be followed. In view of what the Supreme Court has said and the growing tendency to limit the defense of assumption of risk, and when indemnity is allowed, to apportion damages according to fault rather than to bar them altogether, we feel confident that a sailor cannot be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice. His penalty under the Jones Act for such carelessness is an abatement of his recovery in proportion to his own contributory negligence. We do not, however, suggest that a seaman who uses a defective appliance or chooses an unsafe place to work, contrary to orders, could recover indemnity from his employer on any theory and our decision in Johnson v. United States, 74 F. (2d) 703, may be sustained because the seaman there was given orders not to go to his mess-room over an exposed deck, but to take a shaft tunnel in rough weather. Here the defendant argues that aside from the failure of the trial judge to charge as requested in respect to assumption of risk, (a charge which we hold was properly refused), he erred in his subsequent statement that: "There is no contributory negligence or assumption of risk on the part of a plaintiff in so far as the defendant fails in these duties", that is to say, the duties to furnish the seaman with a safe place to work and with safe appliances. But the judge had already carefully instructed the jury as to the proper verdict in case they should find that there was negligence on the part of both parties, and had told them that after determining the amount of damages they should deduct a sum [fol. 498] in proportion to the extent that plaintiff's own negligence had contributed to his injuries. The remarks which the judge made when declining the request to charge about assumption of risk cannot possibly have led the jury to believe that proof of contributory negligence would not have the effect of lessening the amount of the recovery. He obviously meant to say that neither contributory negligence nor assumption of risk would be a legal bar to recovery. If

defendant's counsel had any objection to the remarks and thought in view of the whole charge that they were misleading he should have specifically pointed out the difficulty so that the judge could clarify the statement if it was obscure. Instead of that he took a general exception and said at folio 1261 that his only exception "which possibly is not an exception" to the charge is that the court did not make sufficiently clear the maintenance and cure feature of the case. The court thereupon further defined the responsibility of a shipowner for maintenance and cure and no exception was taken to the definition.

We have examined the rulings of the trial court in regard to the admission and exclusion of evidence and find no error. The only possible criticism is the admission of plaintiff's Exhibit No. 3. This was a statement prepared by the third mate at the time he paid off the plaintiff, of which he gave the plaintiff a carbon copy. There was evidence that he was in charge of the ship at the time. The defendant had already put in evidence another report of the accident, prepared by the master. Each report constituted a record of the accident, and if one was to be admitted, the other was properly received. Casey v. Boston & Maine R. R., 231 [fol. 499] Mass. 529. Moreover Exhibit No. 3 at worst only reiterated the story which plaintiff had already told and was based on no more than his report to the mate.

Objection was also made to the awards for negligence and for maintenance and cure on the ground that each was excessive. There was proof of some damage under each count, and this court is without power to reduce the verdict.

Judgment affirmed.

[fol. 499½] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Herbert A. Smith, Jr., against Socony Vacuum Oil Company, Inc. Opinion. Augustus N. Hand, C. J. Rec'd 4/4/38. *J. W. M.*

[fol. 500] UNITED STATES CIRCUIT COURT OF APPEALS, SECOND CIRCUIT

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the 11th day of April, one thousand nine hundred and thirty-eight.

Present: Hon. Martin T. Manton, Hon. Augustus N. Hand, Hon. Harrie B. Chase, Circuit Judges.

HERBERT A. SMITH, JR., Plaintiff-Appellee,

vs.

SOCONY VACUUM OIL COMPANY, INC., Defendant-Appellant

Appeal from the District Court of the United States for the Southern District of New York

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with interest and costs.

It is further ordered that a mandate issue to the said District Court in accordance with this decree.

Wm. Parkin, Clerk.

[fol. 501] [Endorsed:] United States Circuit Court of Appeals, Second Circuit. Herbert A. Smith, Jr., vs. Socony Vacuum Oil Company, Inc. Order for mandate. United States Circuit Court of Appeals, Second Circuit. Filed Apr. 11, 1938. William Parkin, Clerk.

[fol. 502] UNITED STATES OF AMERICA,
Southern District of New York:

I, William Parkin, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 501, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of Herbert A. Smith, Jr., Plaintiff-Appellee, against Socony Vacuum Oil Company, Inc., Defendant-Appellant, as the same remain of record and on file in my office.

In Testimony Whereof, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this twenty-seventh day of April, in the year of our Lord one thousand nine hundred and thirty-eight, and of the Independence of the said United States the one hundred and sixty-second.

Wm. Parkin, Clerk. (Seal United States Circuit Court of Appeals, Second Circuit.)

[fol. 503] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 10, 1938

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted. And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Stone and Mr. Justice Roberts took no part in the consideration and decision of this application.

[fol. 504] SUPREME COURT OF THE UNITED STATES

STIPULATION AS TO PRINTING OF RECORD—Filed November 1, 1938

Whereas the petitioner herein does not Question the verdict of the jury in the amount of Five Hundred Thirty-five Dollars ($535.00) for maintenance and cure on the Third Cause of action of the respondent's complaint and the petitioner will raise no issue with respect to that; so also the petitioner on this appeal will not raise any question as to the adequacy or inadequacy of the verdict on the First Cause of action of the respondent's complaint and will not urge any exceptions taken on the admission or exclusion of evidence.

Therefore, it is Hereby Stipulated and Agreed by and between the attorneys for the respective parties hereto that the following portions of the printed Transcript of Record in the Circuit Court of Appeals may be eliminated in printing the Transcript of Record herein in the Supreme Court of the United States for the review of the decision below, to wit:—

1. Eliminate all of the matter on page 34 except the first 8 lines on that page.

2. On page 35 eliminate the first 4 lines.

3. On page 51 eliminate the first 14 lines on that page.

[fol. 505] 4. On page 59 eliminate the last 6 lines on that page.

5. On page 60 eliminate the first 10 lines on that page.
6. On page 67 eliminate the last 15 lines on that page.
7. On page 68 eliminate the first 20 lines on that page.
8. On page 77 eliminate the last 19 lines on that page.
9. On page 78 eliminate the first 8 lines on that page.
10. On page 84 eliminate the indented matter at the bottom of the page beginning with the words "Mr. Potter" and ending with the word "please", and in the next line omit the following "Q. (continuing)."
11. On page 133 eliminate all the matter on that page except the first 6 lines.
12. On page 138 eliminate all the matter following the first 9 lines.
13. Beginning with page 139 eliminate everything contained in the record up to and including the end of page 177.
14. On page 184 eliminate the entire page except the first 11 lines.
15. On page 185 eliminate the entire page.
16. On page 186 eliminate the entire page except the 13th and 14th lines reading "The Court: Plaintiff rests, does he? Mr. Engelman: Plaintiff rests, yes." and the last 6 lines on that page.
17. Eliminate the entire matter on pages 187, 188, 189 and 190.
18. On page 191 eliminate the first 14 lines and the 11 lines preceding the last 2 lines.
19. On page 192 eliminate the entire page except the first 5 lines and the last 6 lines.
20. On page 193 eliminate the entire page except the first 3 lines.
21. Eliminate the entire matter contained on pages 194, 195, 196, 197, 198, 199 and 200.
22. On page 201 eliminate the first 8 lines.
23. On page 203 eliminate the last 7 lines on that page.
24. On page 204 eliminate the entire page except the last 9 lines on that page.

[fol. 506] 25. On page 208 eliminate the last 9 lines on that page.

26. On page 209 eliminate the entire page except the last 3 lines.

27. On page 210 eliminate the entire page except the last 8 lines.

28. Eliminate all the matter contained on pages 220 to 246, both pages inclusive.

29. On page 260 eliminate the last 5 lines on that page.

30. On page 261 eliminate all the indented matter, being the first 12 lines and the last 12 lines.

31. On page 262 eliminate all the indented matter, being the first 18 lines.

32. On page 264 eliminate the entire page except the first 7 lines.

33. On page 265 eliminate the first 13 lines.

34. On page 278 eliminate all the indented matter beginning with the words in the 4th line "The Court" and ending with the word "resumed)".

35. On page 291 eliminate the last 8 lines on that page and eliminate pages 292, 293 and 294.

36. On page 295 eliminate the entire page except the last 8 lines.

37. On page 305 eliminate the last 15 lines.

38. Eliminate all matter on pages 306, 307, 308 and 309.

39. On page 310 eliminate all the indented matter, being the first 20 lines.

40. On page 317 eliminate all the indented matter, being the last 16 lines.

41. On page 325 eliminate lines 3 to 20 inclusive, beginning with the language "Q. Were you" and ending with the language "as the other".

42. On page 334 eliminate lines 9 to 20 inclusive, beginning with the language "Q. When an" and ending with the language "your question,".

43. On page 343 eliminate the last 2 lines.

44. On page 344 eliminate the first 20 lines.

[fol. 307] 45. On page 370 eliminate the entire page except the portion of line 7 which reads "Mr. Potter: Defendant rests", (the word "no" being omitted, the initial letter of the word "defendant" should be capitalized), and except the last 2 lines on that page.

46. Eliminate pages 422 to 432 both numbers inclusive, except the last line on page 432 which reads: "The jury returned to the courtroom".

47. Omit entirely from the Record the following pages—Pages 439 to 474, both numbers inclusive.

Dated, New York, October 31st, 1938.

Louis Mead Treadwell, Attorney for Petitioner.
George J. Engelman, Attorney for Respondent.

[fol. 508] [File endorsement omitted.]

Endorsed on cover: File No. 42,680. U. S. Circuit Court of Appeals, Second Circuit. Term No. 195. Socony-Vacuum Oil Company, Inc., petitioner, vs. Herbert A. Smith, Jr. Petition for writ of certiorari and exhibit thereto. Filed July 11, 1938. Term No. 185, O. T., 1938.

FILE COPY

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CHARLES ELMORE CROPLEY
CLERK

Supreme Court of the United States

OCTOBER TERM 1938.

No. 195

SOCONY-VACUUM OIL COMPANY, INC.,
(Defendant-Appellant below),
Petitioner,

—against—

HERBERT A. SMITH, JR.,
(Plaintiff-Appellee below),
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE J. ENGELMAN,
Counsel for Respondent,
No. 44 Whitehall Street,
New York City.

FREDERICK R. GRAVES,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM 1938.

No.

SOCONY-VACUUM OIL COMPANY, INC.,
(Defendant-Appellant below),
Petitioner,

—against—

HERBERT A. SMITH, JR.,
(Plaintiff-Appellee below),
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

The Facts.

The opinion of the United States Circuit Court of Appeals Second Circuit, 96 Fed. (2d) 98, sets forth respondent's task at the time of the accident, the way he did the task and the manner in which the accident occurred.

The place of work was confined and restricted, being limited to fifty-one inches in length (R. 355, 356) and in the absence of orders and instructions, the presence of the stepplate (the cause of the accident) invited its use, see photographic exhibits (R. 434, 436, 476). Petitioner gave respondent no orders or instructions how to do the task (R. 135). There is not a scintilla of evidence that respondent was forbidden to use the stepplate or that he was ordered

or instructed to do the task the way petitioner contends it should have been done. Respondent's superior, the first assistant engineer, testified that he and the ship's other engineers did not order or instruct respondent how to do the task, that there was no set or uniform way of doing the task and that he had seen the ship's oilers do the task in different ways (R. 341, 343, 350, 351). From the time respondent joined the ship, every twenty minutes he was on watch, he did the task the same way (R. 93, 136). Respondent did the task that way because it was the best and most thorough way (R. 394, 395). and it was the only safe way he could do it (R. 88, 89, 90). Prior to the accident he had done the task that way in the presence of his superior, without reprimand (R. 134, 135, 136).

FIRST POINT.

There is no opinion, authority or reason to support the petition for the writ.

In *Arizona* v. *Anelich,* 298 U. S. 110 and *Beadle* v. *Spencer,* 298 U. S. 124, this Court squarely held that a seaman does not assume the risk of a defective appliance or an unsafe place to work. Petitioner seeks to bring this case outside that rule on the ground that within the restricted limits of respondent's place of work he could have done the task without using the defective stepplate, or stated another way, that respondent had a choice between a safe and an unsafe way of doing his task.

There are cases holding that a seaman assumes the risk if he selects an unsafe way when a safe way is available; an analysis of the cases cited by peti-

tioner discloses that the rule has been restricted to cases where the seaman was not engaged in a task and subject to the compulsion and restraint of duty.

In *Holm* v. *Cities Service Transportation Co.*, 60 Fed. (2d) 721 (C. C. A. 2, 1932) the seaman went aft for a drink of water by means of the safe flying bridge and he then elected to return to his quarters by means of the dangerous well deck.

In *Johnson* v. *U. S.*, 74 Fed. (2d) 703 (C. C. A. 2, 1935), the seaman took the dangerous open well deck on his way to supper despite orders to use the safe shaft tunnel.

In *Hardie* v. *N. Y. Harbor Dry Dock Corporation*, 9 Fed. (2d) 545 (C. C. A. 2, 1925), the seaman in going to his place of work elected to proceed by means of a dark passageway when a lighted and safe route was available for his use.

In *Tampa Interocean S. S. Co.* v. *Jorgensen*, 93 Fed. (2d) 927 (C. C. A. 5, 1938), the plaintiff was proceeding below to cover a 'tween deck hatch; there were two ladders leading to the 'tween deck, but only one provided a safe means of access and in proceeding to his place of work he took the ladder providing the unsafe way. The trial judge modified defendant's request to charge as to assumption of risk and charged in part:

> "* * * *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method the defendant is not liable."

Plaintiff had judgment, on appeal it was affirmed and held that the trial judge properly modified the

request. As plaintiff had judgment, the Appellate Court was not called upon to decide whether the charge as given was too broad; consequently the charge as given cannot be regarded as a rule of law promulgated by the Appellate Court.

Argument.

In each of the foregoing cases the seaman was not engaged in a task, he was proceeding to a destination and he merely had to choose between two clearly marked and defined routes, one being obviously safe and the other just as obviously unsafe; *in effect no choice was required since the safe route was the natural way to proceed.*

The facts here are entirely different. Respondent was engaged in a task, it was not a simple one as it involved complicated machinery. Respondent was subject to the compulsion and restraint engendered by the performance of the task and since he was not ordered or instructed how to perform it, he was compelled to exercise judgment in choosing a method or technique of performance. The facts clearly indicate that he chose the most thorough method and the only safe and practical way. True, after adopting the method, an appliance he had to use became defective. Assuming, without conceding, that he could have done the task by abandoning the defective appliance (the stepplate) and standing some other place, it would seem that the particular point at which he stood within the narrow limits of his place of work, invokes the doctrine of contributory negligence and not the defense of assumption of risk. As this Court in *Beadle* v. *Spencer* (*supra*), said:

"It may be that he was negligent in standing at one point rather than at another upon the unsafe pile of lumber, see *Seaboard Air Line Ry. Co.* v. *Horton*, 233 U. S. 492; *cf. The Frank and Willie, supra*, and that an instruction as to the effect of his negligence would have been appropriate. But we think the charge in the form requested, so far as applicable to the evidence, and in view of that actually given, amounted to no more than a request to charge that his negligence was a defense."

It is certain that no American case has recognized the rule that petitioner seeks to establish.

Petitioner also relies on *Scheffler* v. *Moran Towing & Transportation Co., Inc., et al.*, 68 Fed. (2d) 11 (C. C. A. 2, 1933), and *Hunt, et al.* v. *Hobbs, Wall & Co.*, 42 Fed. (2d) 437 (C. C. A. 9, 1930). These cases are completely outside the issues under consideration here and do not give petitioner the slightest support.

In the *Scheffler* case plaintiff was employed on a harbor tug which he left every evening and he knew that she was shorthanded when he went aboard on the day of the accident; he was held to have assumed the risk of shorthandedness on the ground that he had the alternative of quitting. The case is overruled by *Beadle* v. *Spencer* (*supra*), in which it was held that a seaman does not assume the risk of an unsafe place to work when the ship is moored to a dock.

The *Hunt* case did not involve defective equipment or a place of work that had been made unsafe. There the decedent, in order to free a piece of timber, voluntarily went out on a narrow beam which ran across

an open hatch, the beam was part of the ship's framework and was not constructed or intended as a place of work at any time; it was not defective and decedent fell from it because of his position and carelessness on it. The Court said that the accident:

> "* * * was caused by the unusual position of the decedent and not by any structural defect of the beam."

SECOND POINT.

The decision below creates no conflict of opinion or authority between the second and other circuits.

Petitioner only cites *American Pacific Whaling Company* v. *Kristensen*, 93 Fed. (2d) 17 (C. C. A. 9th, 1937), and *Tampa Interocean S. S. Co.* v. *Jorgensen* (*supra*), in support of the contention that the decision below is in conflict with the decisions of the Circuit Courts of Appeals in other circuits.

In the *Kristensen* case, the whaling gun was defective and the question of choice of working place or equipment was not raised by the parties and not discussed in the opinion. The case cannot be a source of conflict here.

Tampa Interocean S. S. Co. v. *Jorgensen* (*supra*), has been analyzed (pp. 3, 4), it merely involved a choice of routes to a destination and further, as pointed out, the decision of the Circuit Court of Appeals, Fifth Circuit, did not make the modified charge of the trial judge a rule of law for that circuit.

It is apparent, that at this time, there is no conflict between the Circuit Courts of Appeals.

CONCLUSION.

The petition for certiorari should be denied.

Respectfully submitted,

GEORGE J. ENGELMAN,
Counsel for Respondent.

FREDERICK R. GRAVES,
Of Counsel.

Office - Supreme Court, U. S.
FILED
DEC 13 1938
CHARLES ELMORE CROPLEY
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Supreme Court of the United States

October Term 1938.

No. 195.

SOCONY-VACUUM OIL COMPANY, INC.,

Petitioner,

—against—

HERBERT A. SMITH, JR.,

Respondent.

BRIEF FOR RESPONDENT.

GEORGE J. ENGELMAN,
Attorney for Respondent.

THE COURT PRESS, N. Y. C.

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Sunday Creek Co. v. *Gray*, 238 Fed. 325 (C. C. A. 4th, 1916) 5*n*

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OTHER AUTHORITY CITED:

Section 33 of the Merchant Marine Act of 1920, U. S. C. A., Title 46, Sec. 688. ..... 5*n*

Supreme Court of the United States

October Term 1938.

No. 195.

SOCONY-VACUUM OIL COMPANY, INC.,
Petitioner,

—against—

HERBERT A. SMITH, JR.,
Respondent.

BRIEF FOR RESPONDENT.

Statement of the Case.

Respondent's Job, Experience and Ability.

Respondent was employed as an oiler; every twenty minutes during his watch it was his job to determine if the L. P. or low pressure bearing and journal of the ship's engine required lubrication (R. 24).

All of respondent's experience at sea had been in petitioner's employ. He took his first job at sea in petitioner's employ as a fireman on February 2, 1934; he was promoted to the rank of wiper on November 20, 1934, and to the rank of oiler on December 30, 1934, which was about five months prior to the accident, although he did not work steadily as his ship was laid up during part of the time (R. 21-22). His rapid promotion clearly indicates his ability.

The Low Pressure Bearing and Journal.

The low pressure bearing is one thing and the low pressure journal is another. Many of the witnesses referred to the bearing and journal as one and the same thing; they are not and the distinction is important. The journal is that part of the crank-shaft which rotates against the bearing. The bearing is that which encloses and supports part of the crank-shaft and that part of the crank-shaft which is enclosed and supported by the bearing is called the journal (R. 160-162, 229). The bearing is fitted around the journal to within 1/10,000ths of an inch and as the latter revolves both require lubrication (R. 214). Consequently, every twenty minutes it was respondent's duty to make an inspection.

On Defendant's Exhibit J (R. 252) the line above the Fig. 2 indicates the length of the bearing; as the bearing is enclosed in the bed plate indicated by the same Fig. 2, the only part of the bearing visible is the edge of the bearing indicated by the Fig. 8; the dotted line indicates the visible part of the crank-shaft and where it continues through and inside the bearing as indicated by the length of the bearing line, it is called the journal (R. 204-205).

There is a hole or opening indicated by the Fig. 3 on Plaintiff's Exhibit 1 (R. 247) which goes through the bed plate or bearing support, and through the bearing as well, directly to the journal (R. 160-161).

How the Accident Occurred.

Respondent testified that he stood with his right foot on the step-plate marked Fig. 1 and with his left foot on the bed plate marked Fig. 2, that with his

left hand he held onto the slush-pan marked Fig. 4 as he placed his right hand down into the hole or opening marked Fig. 3 to feel the "low pressure journal"; all figures marked on Plaintiff's Exhibit 1 (R. 247); in using the term "journal" he did not use it in a technical sense by referring to the part of the crank-shaft which rotates against the bearing but he referred to the bearing itself which is made of alloy (R. 24), for at the bottom of the hole in which he placed his hand he could feel the bearing as well as the revolving crank-shaft or Journal (R. 149). He said that there was a bracket or strut which ran from the angle-iron marked by the Letter A on Plaintiff's Exhibit 1 (R. 247) and by the Letter Z on Plaintiff's Exhibit 2 (R. 248) to the underside of the step-plate; that the bracket or strut had become loose and it projected out beyond the step-plate and after he made his inspection and brought his left foot back to the step-plate, he was tripped by the loose bracket and precipitated into the pit or bilge, *i. e.*, the opening or space between the points indicated by the Letters S and L on Plaintiff's Exhibit 2 (R. 248), (R. 25-30).

Respondent said the bracket was loose two to three weeks prior to the accident at which time he reported the condition to the first assistant engineer (R. 29-30), however, there is no proof that at the time respondent went on the step-plate the loose bracket was projecting out beyond the edge of the step-plate so as to be visible to him, in fact it is an inference from respondent's testimony that with the vibration of the ship the loose bracket moved out beyond the edge of the step-plate while he was on it (R. 67).

Petitioner's Contention.

Below.

Petitioner contended below:

(1) That the step-plate was intended for use only when the ship was in port in order to reach overhead in cleaning, wiping and repairing the engines (R. 146, 192, 199).

(2) That respondent should have done the job while standing on the floor plates holding a grab-iron marked Fig. 3 and feeling the edge of the bearing marked Fig. 8; all figures marked on Defendant's Exhibit J (R. 252), (R. 147, 157).

On the basis of these contentions, petitioner sought to invoke the defense of assumption of risk below.

On This Appeal.

It appears from petitioner's brief that the contention to be urged on this appeal is that respondent had a REAL CHOICE between safe equipment and unsafe equipment in doing his job, and that he assumed the risk because he VOLUNTARILY chose the unsafe equipment.

Argument.

I.

If the defense of assumption of risk is available in an action under the Jones Act[1] petitioner had the burden of proving it below and failed to do so.

The defense of assumption of risk must be pleaded and proved by the party asserting it.[2] And the proof does not support the proposed rule of assumption of risk laid down in "Petitioner's Contention on this Appeal".

Petitioner offered no proof:

(1) That respondent or any of the other oilers were ordered or instructed to avoid the use of the step-plate except when the ship was in port.

(2) That respondent or any of the other oilers were ordered or instructed to do the job the way the petitioner contends it should have been done.

(3) That it promulgated any rules, instructions or orders with respect to the performance of the job.

(4) That there was any established custom and practice on the ship or on ships having similar engines to avoid the use of the step-plate except when the ship was in port and to do the job the way petitioner contends it should have been done.

Respondent's superior, the first assistant engineer, testified that he never instructed respondent with re-

[1] Section 33 of the Merchant Marine Act of 1920, U. S. C. A., Title 46, Sec. 688.

[2] *Sunday Creek Co.* v. *Gray*, 238 Fed. 325 (C. C. A. 4th, 1916).

spect to the job, that he saw respondent do the job prior to the accident but could not recall how he did it, he said that it must have been done correctly as he did not reprimand respondent (R. 189). The same witness testified that not one of the four engineers comprising the entire licensed personnel of the engine department gave any instructions to the oilers in connection with the performance of the job and the use of the step-plate (R. 194-195). Petitioner offered no evidence that it promulgated or enforced any orders, rules or regulations requiring the oilers to avoid the step-plate except when the ship was in port and to do the job by feeling the edge of the bearing rather than by feeling it through the hole in the bed plate. Petitioner did not elicit the testimony of a single oiler to support its contention.

The only proof elicited by the petitioner in support of its contention is the testimony of the chief engineer, the third assistant engineer, the first assistant engineer and one expert. They all testified that respondent should have avoided the step-plate and felt the edge of the bearing, however, judicial notice has been taken of the fact that officers, when testifying stick with their ship.[1] The testimony of the engineers was nothing more than opinion evidence, for they did not testify to any custom and practice by the ship's oilers in support of petitioner's contention, and as the engineers did not oil, no custom and practice was proved; it is obvious that there was none, for the first assistant engineer admitted that he had seen oilers do the job in different ways, and when he testified that he had seen oilers do the job without using the grab-iron (R. 187) petitioner's contention took a lethal blow,

[1] *The Iadien*, 71 Fed. (2d) 752 (C. C. A. 9th, 1934).

as it did when petitioner's expert testified that the grab-iron was for use when the ship was rolling (R. 198).

And petitioner offered no evidence of custom and practice on other vessels with similar engines, to support its contention.

In view of this state of the proof, the presence of the step-plate within the restricted limits of respondent's place of work in close proximity to the bearing and its obvious adaptability to the performance of the job, most certainly invited and led respondent to use it. Certainly respondent could not anticipate that the step-plate was intended only for use when the ship was in port. Petitioner's contention with respect to the use of the step-plate taxes credulity to the extreme, in view of the fact that it was only a foot above the floor plate and only 10 to 12 inches in length (R. 201), and the record is barren of any explanation as to how the step-plate would aid in the work for which petitioner contends it was intended.

At the time of the occurrence of the accident respondent was doing the job the way he had been taught in petitioner's employ (R. 63). He became accustomed to do the job that way and he always did it the same way (R. 65).

By its contention petitioner divides the small and confined place of work into a safe place and an unsafe place and places upon respondent the burden of making the division, although, in the light of the proof, petitioner did nothing to make it apparent. It is a fair inference from respondent's testimony that no choice of working places was apparent to him at the time he met with the accident, for when

he testified that he could not reach the bearing while standing on the floor plates and holding the grab-iron (R. 62-63), he was not referring to the edge of the bearing but to the center of the bearing in the hole at the bottom of the bed plate, for he testified, "You couldn't get down in 8 or 9 inches unless you were a contortionist". There is no proof that at the time of the accident petitioner knew that he could do the job by feeling the edge of the bearing.

The proof indicates that petitioner did nothing to present the choice of another way of doing the job, that it is doubtful whether such choice was apparent to respondent, and that if it was apparent to him, he was not free to make a purely voluntary choice, for he was influenced by what he had been taught in petitioner's employ and by the presence and adaptability of the step-plate at the place of work.

And the matter of a purely voluntary choice would seem to involve the relative merits of the way respondent did the job and the way petitioner contends he should have done it.

Respondent by placing his hand in the hole in the bed plate and reaching down to the bearing could determine by the color of the oil on his fingers whether the bearing was beginning to gripe and need lubrication (R. 24). At that point, the center of the bearing, the color of the oil as well as the heat of the bearing would indicate the need for lubrication. Petitioner contends that it is enough to feel the edge of the bearing, but at that point the need for lubrication can be determined only by the heat of the bearing. By the color of the oil respondent was able to determine the need for lubrication before it was reflected in a hot bearing and possible damage to the

ship's engine. Certainly respondent's way of doing the job was more thorough and efficient.

Respondent's reach from finger tips to finger tips is 61 inches (R. 54); the hole in the bed plate leading to the journal was 8 to 10 inches in depth (R. 25); petitioner's own expert testified that the distance from the grab-iron to the top of the hole was 51 inches (R. 205). The loss of reach in grasping the grab-iron in one hand, and in bending the other hand and arm and reaching 8 to 10 inches into the hole, makes it apparent that it was impossible to hold the grab-iron and feel the bearing at the bottom of the hole (R. 62).

There is no evidence that respondent could have stood at any place save the step-plate in order to feel the bearing through the hole. Petitioner, although it produced an expert who had made measurements, offered no proof that respondent could have done the job that way without using the step-plate. In fact it appears obvious from Plaintiff's Exhibits 1 and 2 (R. 247-248), that it is extremely hazardous if not impossible to reach over to the hole indicated by the Fig. 3 and reach 8 to 10 inches down into the hole to the bearing and journal without using the step-plate, for the presence of the step-plate would certainly interfere if not prevent it.

The way petitioner contends the job should have been done was not without dangers. In order to hold the grab-iron with one hand and touch the edge of the bearing with the other, respondent would have to reach over the open bilge and assume a stretching position. Respondent appreciated these dangers (R. 62) and petitioner's witness, the first assistant engineer, admitted them (R. 152).

If a choice was apparent to respondent, it appears that he was compelled to weigh the relative dangers and merits of the two ways of doing the job; under such circumstances his choice could not be purely voluntary. It is apparent that the Circuit Court of Appeals had this state of the proof in mind when in the opinion below it stated that, "a sailor cannot be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice". But it is not conceded that respondent made a careless choice, for he did the job in the most thorough and efficient way.

II.

Under the Maritime Law the shipowner has an absolute obligation to provide safe equipment.

The loose bracket was defective equipment and constituted unseaworthiness.[1] Under the maritime law, before the Jones Act and after, there has always been an absolute obligation on the part of the shipowner to provide a seaworthy vessel. In *Panama Ry. Co.* v. *Johnson,* this Court[2] affirmed the Circuit Court (Second Circuit)[3] where that Court held:

> "The maritime law imposed upon the shipowner the risk incident to the use of defective and dangerous appliances, and we see nothing in the new legislation which changes the law in this regard. * * * What the law previously was is stated by this Court in *Cricket* v. *Parry* * * *

[1] *Storgard* v. *France & Canada S. S. Corporation,* 263 Fed. 545 (C. C. A. 2nd, 1920).

[2] (1924) 264 U. S. 375, 68 L. Ed. 748.

[3] 289 Fed. 964 (C. C. A. 2nd, 1923).

in which we held that a shipowner cannot avoid liability for injury to a seaman by a defective and dangerous appliance, on the ground that the seaman knew of the defect when he shipped. We declared in that case that, if a shipowner supplied a defective and dangerous appliance when a proper one could not be obtained, he did so at his own risk and not at the risk of the seaman."

III.

Before the Jones Act assumption of risk was not recognized as a defense in suits by seamen to recover for injuries due to defective equipment.

Prior to the Jones Act a seaman assumed only the risks incident to his perilous calling.[1] He never assumed the risk of defective equipment; in *The Arizona* case[2] this Court in referring to suits by seamen under the maritime law prior to the Jones Act to recover for injuries due to defective equipment said:

> "But no American case appears to have recognized assumption of risk as a defense to such a suit. In numerous cases this defense was either denied or ignored in circumstances plainly calling for its application had it been available."

And the defense of assumption of risk was not recognized where a seaman had a real choice between safe equipment and unsafe equipment and voluntarily chose the latter. *Olson* v. *Flavel*,[3] there a mate chose

[1] *The Iroquois* (1904), 194 U. S. 240, 48 L. Ed. 955.

[2] *The Arizona* v. *Anelich* (1936), 298 U. S. 110, 80 L. Ed. 1075.

[3] 34 Fed. 477 (D. C. 1888).

to take coal aboard by means of a narrow plank and a defective wheelbarrow when a safe iron chute was available for performing the task. The Court indicated that the libelant could have avoided the accident, but held that his conduct constituted contributory negligence which was not a bar to recovery and said:

> "The third point made in support of this defense is that the mate had the choice of methods in putting the coal on board, and that, having adopted the dangerous one, he was guilty of negligence, and must bear the consequences. In other words, he might have used the chute, or constructed a gangway of greater width out of the plank at his service, on the wharf; and, if the barrows were out of order, he might have informed the master of the fact, so that others could have been obtained.
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> * * *
>
> "On the whole, my judgment is that the libelant is not blameless in the matter. He should have put the coal on with the chute or constructed a safer gangway to wheel on.
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> * * *
>
> "This is the first time the question has been made in this court, and I feel justified, in the light of the authorities cited, to follow the leading of my own judgment, and hold that contributory negligence is not a bar to a suit in admiralty, for damages arising from a personal injury. For whatever may be said by the sages of the common law, about the difficulty in such cases of determining 'whose wrong-doing weighed most in the compound that occasioned the mischief', it is not just to leave a seaman to suffer, without redress, all the consequences of an injury caused by the fault of his employers as well as his own."

And where a seaman voluntarily places defective equipment to a use, for which it was obviously not constructed and intended and which the shipowner was not able to anticipate, the defense was not available even though safe equipment was set up and available for the work at hand, *Storgard* v. *France & Canada S. S. Corporation.*[1] That was an action under the general maritime law before the Jones Act; there the seaman used a ring connected with one of the sails in ascending the mast; he was injured by a worn and defective bolt on the ring and he did not have to use the defective ring in ascending the mast. The Trial Court charged the jury that the shipowner was not liable unless it could have reasonably foreseen the use of the ring and the occurrence of the accident. The Circuit Court (Second Circuit) held the charge improper, reversed the judgment for the defendant and said:

> "If the bolt was worn and defective, and the shipowners knew or ought to have known the fact, it makes no difference whether they as reasonable men would not have apprehended the particular accident which actually did happen."

IV.

The Jones Act did not make the defense of assumption of risk available in a suit by a seaman to recover for injuries due to defective equipment. No case since the Jones Act has recognized assumption of risk as a defense to such a suit.

While the defense of assumption of risk was never recognized in a suit by a seaman to recover for injuries due to defective equipment before the Jones

[1] *Supra.*

Act, the question arises did the Act make the defense available? This Court considered that question and answered it in the negative in *The Arizona* case[1] where it said:

> "But the Jones Act does not, by its own terms, or by those adopted by reference from the Employers' Liability Act, prescribe that assumption of risk shall be a defense to the liability imposed for injuries to seamen on navigable waters, or, apart from the specific references to the fellow servant and contributory negligence rules, purport to enlarge or modify the defenses available in maritime law to suits brought to recover for such injuries. In the absence of such a definite command the scope of the new rules of liability and the nature of the defenses to them must be ascertained by reference to their new setting in the admiralty system.
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> * * *
>
> "* * * No provision of the Jones Act is inconsistent with the admiralty rule as to assumption of risk. The purpose and terms of the Act and the nature of the juristic field in which it is to be applied, preclude the assumption that Congress intended, by its adoption, to modify that rule by implication. Such has been the conclusion reached generally by the lower federal courts, although not with entire unanimity."

While the defense of assumption of risk has been recognized and invoked in some few cases on which petitioner relies, in not one of these cases was the injury due to defective equipment.

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[1] *Supra.*

In *Holm* v. *Cities Service Transportation Co.*[1], the plaintiff was a third mate and while he was in charge of loading the vessel with a cargo of oil, pools of oil accumulated on the deck which was a necessary concomitant to loading, he knew of this condition and while he was off duty, he went aft for a drink of water by means of a safe deck and then elected to return to his quarters by means of the oily deck and was injured. The Court said:

> "So a seaman off duty who has gone for a drink of water and decides to return to his room over a deck he knows is slippery and may have oil collected in pools upon it, when he knows there is a safe though somewhat longer way for him to return, must be held to have assumed the known and obvious risks incident to his voluntary choice."

Holm was free from the compulsion and restraint of duty and two clearly separate, marked and defined routes, the condition of which he knew, were open to him, under these circumstances he was not confronted with a problem of choice, for the safe route was the only natural way to proceed.

In *Johnson* v. *United States*[2], the decedent was off duty and was proceeding forward to supper by means of the open well deck which was obviously dangerous because of heavy seas; the crew had been admonished not to go over the open well deck but to use the safe shaft tunnel in rough weather. The Circuit Court (Second Circuit) held that decedent assumed the risk. This case presents the same considerations as *Holm* v. *Cities Service Transportation Co.*[3], except that the decedent disregarded admonitions to avoid

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[1] 60 Fed. (2d) 721 (C. C. A. 2nd, 1932).

[2] 74 Fed. (2d) 703 (C. C. A. 2nd, 1935).

[3] *Supra.*

the dangerous well deck, which is an added factor for invoking the defense of assumption of risk.

In *Scheffler* v. *Moran Towing & Transportation Co.*[1], libelant was a day time employee and the morning he went aboard on the day of the accident he knew the tug was shorthanded and that he would be required to tend certain lines during the day, although he was employed as a cook. The Circuit Court of Appeals (Second Circuit) held that he assumed the risk on the ground that he had the alternative of quitting the morning he came aboard as his status was not that of a seaman but similar to that of a longshoreman. The Court stated:

> "* * * nor does it excuse those who, though strictly speaking they are seamen, are employed upon harbor craft, on which they serve only during the day, leaving each night to go home, and renewing their work every morning, like any shore workmen. Such men are in the position of longshoremen or other casual workers on the water * * *."

The same Court reached the same conclusion under similar circumstances in *Skolar* v. *Lehigh Valley R. Co.*[2]. As these cases involved maritime employees whose status was akin to that of shore workmen, no rules of assumption of risk applicable to a seaman's case were laid down. The principle that an opportunity to quit the vessel and abandon an unsafe working place invokes the defense of assumption of risk in the case of seamen was reversed by this Court in *Beadle* v. *Spencer*[3], where it was stated:

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[1] 68 Fed. (2d) 11 (C. C. A. 2nd, 1933).

[2] 60 Fed. (2d) 893 (C. C. A. 2nd, 1932).

[3] (1936), 298 U. S. 124, 80 L. Ed. 1082.

"Nor do we perceive any adequate ground for judicial relaxation of the admiralty rule, applicable under the Jones Act, that assumption of risk is not a defense to a suit to recover for injury to a seaman resulting from unseaworthiness or defective equipment, because he chances to be in some measure less amenable to the iron discipline of the sea than others who go upon foreign voyages. Even so his freedom to avoid the risk is far from comparable to that of the employee on land where the defense of assumption of risk originated and has been maintained."

And in *Cricket S. S. Co.* v. *Parry*[1], it was held that a seaman does not assume the risk of defective equipment even though he ships with knowledge of the condition. The Circuit Court of Appeals (Second Circuit), stated:

"The defendant contends that the plaintiff cannot recover because he shipped with knowledge of the condition complained of, and because, so far as the wire rope is concerned, proper rope could not be obtained. Two decisions of this court are cited in support of the first proposition, * * *. We do not think them applicable because the plaintiffs were shore servants, in the first a longshoreman, and in the second a railroad hand. We are considering the rights of seamen, who have constituted from early times a peculiar class. The unusual protection extended to them is reflected in the familiar saying that they are the wards of admiralty. As to the second proposition, shipowners cannot justify furnishing them with defective and dangerous appliances on the ground that they knew of it."

In *Hunt* v. *Hobbs Wall & Co.*[2], the decedent was en-

[1] 263 Fed. 523 (C. C. A. 2nd, 1920).

[2] 42 Fed. (2d) 437 (C. C. A. 9th, 1930).

gaged in raising a timber from the hold and in order to free it he went out on a beam running across the open hatch which was part of the framework of the ship, leaned forward and attempted to free the timber with a hook and as he struck at the timber with the hook he missed it, lost his balance and fell into the hold. He was held to have assumed the risk involved in the use of the beam on the ground that he could have freed the timber very easily without using the beam. But the case gives petitioner no support for the reason that the beam was not defective in any respect, the accident was caused wholly and solely through the carelessness of the decedent on the beam. The opinion of the Court indicates that a different result might have been reached had the beam been defective. The Court said:

> "The fact that after it was installed it was used occasionally, or was usually used by the crew as a short cut across the hatch, has no bearing on the accident, which was caused by the unusual position of the decedent and not by any structural defect of the beam."

In *Tampa Interocean S. S. Co.* v. *Jorgensen*[1], the plaintiff was proceeding below to cover a 'tween deck hatch; two routes were available to him to reach his destination, one of the routes had been made unsafe by the stowage of cargo, although it was held that the cargo had not been negligently stowed; a temporary ladder had been rigged leading to the safe route, a permanent ladder led to the dangerous route. The plaintiff was not warned to avoid the permanent ladder and had no knowledge that the route leading from it was dangerous by reason of the cargo; he took

[1] 93 Fed. (2d) 927 (C. C. A. 5th, 1938).

the dangerous route and was injured. The trial judge modified defendant's request to charge as to assumption of risk and charged in part:

> "* * * *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method the defendant is not liable."

Plaintiff had judgment, it was affirmed and held that the trial judge properly modified defendant's request. No defective equipment was involved. Like the *Holm* case[1], a deck became unsafe through taking cargo aboard and a choice of separate paths or routes to a given destination was present; the only substantial difference being that Jorgensen had no knowledge that the path or route he took was dangerous, but it was held that unless he had such knowledge he did not assume the risk. Except for the fact that Jorgensen was on watch, the rule derived from the case is no broader than that of the *Holm* case.

Only in the *Hunt* case[2] was the seaman subject to the coercion involved in the performance of a task and there the task was a simple one—raising timber; but the case does not involve the principle in the "choice cases", for the accident did not occur because Hunt chose to go on the beam, it occurred solely through his carelessness on it. Like the *Scheffler*[3]

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[1] *Supra.*

[2] *Supra.*

[3] *Supra.*

and *Skolar*[1] cases, it may be disregarded in arriving at a conclusion or rule laid down by the "choice cases".

In the *Jorgensen* case[2] the seaman was on duty, but he was proceeding to his place of work, so that he was not subject to the coercion involved in performing a task, and as in the *Holm*[3] and *Johnson*[4] cases, the choice was between clearly separate paths or routes to a destination. In the last two mentioned cases the seaman was off watch and not even subject to the compulsion and restraint of duty.

It is certain that in an action by a seaman to recover for personal injuries, the defense of assumption of risk has never been recognized in cases based on defective equipment or where the seaman, while engaged in the performance of a job, had a choice between a safe working place and an unsafe working place and chose the latter. The defense has been restricted to cases where there was a choice between separate paths or routes leading to a destination and where the seaman knew one route was safe and the other unsafe, and while subject to no compulsion and restraint, he voluntarily elected to take the unsafe route.

In the light of the proof as pointed out *supra* (pp. 5-10) and the authorities, it is apparent that petitioner's contention is supported by neither reason nor authority.

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[1] *Supra.*

[2] *Supra.*

[3] *Supra.*

[4] *Supra.*

V.

Petitioner's contention was submitted to the jury.

A.

BY THE CHARGE OF THE COURT THAT RESPONDENT COULD NOT RECOVER UNLESS PETITIONER WAS NEGLIGENT.

The trial judge charged in substance, that there could be no recovery unless the petitioner was negligent, that petitioner owed respondent the duty of providing him with a safe place in which to work and with safe tools and appliances at his place of work, and that if the breach of either or both of those duties was a proximate cause of the accident, the respondent could recover (R. 234, 238, 239, 241). On the trial petitioner urged, as it does here, that it did provide a safe place to work, but respondent did not choose to use it. In finding against the petitioner the jury necessarily found that no safe place of work was provided, and that finding quashed petitioner's contention, for if no safe place to work was provided, then respondent had no choice.

B.

BY THE CHARGE OF THE COURT ON THE COMPARATIVE OR CONTRIBUTORY NEGLIGENCE RULE.

The Court charged the jury fully on the comparative or contributory negligence rule in a "Jones Act" case (R. 240). In a seaman's case a choice between a safe place to work and an unsafe place to work, raises an issue of contributory negligence and not assumption of risk. In *Olson* v. *Flavel*,[1] where un-

[1] *Supra.*

safe equipment was selected as against safe equipment, the comparative negligence rule was the basis for arriving at a conclusion. And it has been applied to the case of a shore workman who had a choice between two methods of doing his work and chose the more hazardous;[1] there the Court stated:

> "The defendant argues that there was open to the plaintiff a choice between two methods of doing the work and that the plaintiff chose the more hazardous. This argument is properly addressed to an issue of contributory negligence which does not appear to have been raised. Moreover, no showing was made that in the ordinary course of his duties the position taken by the plaintiff was one which he was not entitled to choose. He was obliged to take an appropriate position to perform his duties in braking the string about to be disconnected and the testimony of the defendant's witnesses shows that his position was known to them. The contention is therefore answered by the foregoing decisions in connection with the question of assumption of risk. Under these cases, in the absence of any warning or notice that the position taken was unusually hazardous, any unusual risk attendant thereon was not assumed by the plaintiff."

Petitioner's contention seeks to hold respondent wholly at fault. In view of the many alternatives respondent had to weigh at his place of work as already pointed out *supra* (pp. 5-10), it was for the jury to determine "whose wrong-doing weighed most in the compound that occasioned the mischief" and proportion the damages accordingly.

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[1] *Devaney* v. *Atchison, T. & S. F. R. Co.* (Supreme Court of California, 1933), 219 Cal. 487, 27 P. (2d) 635.

VI.

There should be no exception to the absolute obligation of the shipowner to provide a seaworthy vessel and safe equipment.

The shipowner has an absolute obligation to provide a seaworthy ship and safe equipment; the reasons for the rule are so obvious and have been stated so many times that no restatement is necessary. There should be no relaxation of that rule. Petitioner's contention would open the door by establishing an exception. If the shipowner can be excused for furnishing a defective appliance on the ground that the seaman could have avoided its use, particularly when it can be reasonably anticipated from the very nature of the appliance that the seaman may use it in performing his work, then the law will encourage the use of defective equipment and unseaworthiness. The result is obvious, the efficiency of the Merchant Marine will be greatly impaired.

CONCLUSION.

For the reasons stated, and on the authority of the cases cited, it is respectfully submitted that the judgment be affirmed.

Respectfully submitted,

GEORGE J. ENGELMAN,
Attorney for Respondent.

P. 2.

SUPREME COURT OF THE UNITED STATES.

No. 195.—October Term, 1938.

Socony-Vacuum Oil Company, Inc., Petitioner, vs. Herbert A. Smith, Jr. } On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[January 3, 1939.]

Mr. Justice Stone delivered the opinion of the Court.

The question is whether assumption of risk is a defense in a suit brought by a seaman under the Jones Act to recover for injuries resulting from his use, while on duty, of a defective appliance of the ship, when he chose to use the unsafe appliance instead of a safe method of doing his work, which was known to him.

Respondent, a seaman, brought the present suit in the District Court for southern New York to recover, under the Jones Act, 41 Stat. 1007, 46 U. S. C. § 688, for an injury received from a fall in the engine room of petitioner's vessel. The fall was caused by a defective step on which respondent stood while on duty, when seeking to learn, by touching with his finger, whether an engine bearing was overheated.

In submitting the case to the jury the trial court applied the admiralty rule of comparative negligence, instructing the jury that negligence of respondent contributing to the accident was not a bar to recovery but was to be considered in mitigation of damages. The court refused petitioner's request for an instruction that if respondent could have performed his duty without use of the defective step, he assumed the risk of injury from it. Instead, the court charged that there was no assumption of risk by the seaman where the shipowner failed in its duty to furnish a safe appliance.

Judgment of the district court, upon a verdict in respondent's favor, was affirmed by the Court of Appeals for the Second Circuit, 96 F. (2d) 98, on authority of *The Arizona* v. *Anelich*, 298 U. S. 110, and *Beadle* v. *Spencer*, 298 U. S. 124. The court's decision was predicated upon its conclusion that respondent had free choice of a way to reach and touch the bearing, without standing on the de-

fective step, and it held that in the circumstances, and since the seaman had not used the defective appliance contrary to orders, the trial judge had correctly instructed the jury that assumption of risk was not a bar to recovery. We granted certiorari, — U. S. —, upon a petition asking us to review this ruling in the light of our decisions in *The Arizona* and the *Beadle* cases, *supra*, the question being one of public importance in the application of the maritime law as supplemented by the Jones Act.

A preliminary point, much discussed in brief and argument here, is whether the question ruled upon below is presented by the record. Respondent insists that there was no evidence from which the jury could conclude that there was a safe method known to him by which he could have reached the bearing without using the defective step and that he chose the unsafe instead of the safe method.

Respondent was employed as an oiler in petitioner's engine room. It was his duty while the vessel was under way to touch with his finger, at intervals of twenty minutes, a bearing of the propeller shaft, in order to ascertain whether it was overheating and in need of additional lubrication. Directly in front of the bearing, as he approached it, was an iron step, located about one foot above the engine room floor and bolted to the bedplate which supported the bearing. Petitioner testified that the step was braced on its underside by a bracket or strut, and that about two or three weeks before the accident he had observed that the bracket was loose and out of place and had reported the fact to a superior officer.

Respondent also gave the only account of what occurred at the time of the accident. He testified that in order to reach the bearing it was necessary for him and was his uniform practice to stand with his right foot upon the step with his left advanced and placed upon the bedplate, and with his left hand holding, for support, the upper edge of an adjacent vertical slush pan; that, standing in this position, he placed his right hand in a hole extending downward through the bearing cap a distance of eight or ten inches, where he touched the shaft and the adjoining bearing to discover whether they were overheated and to inspect the oil which stuck to his fingers and which, if discolored, would indicate that the journal was beginning to gripe because of excessive friction; that, as he stepped down his left foot struck the loose bracket, which had projected beyond the edge of the step, causing him to fall and suffer the injuries complained of. There was testimony by petitioner's witnesses, all denied by respondent, from which the jury

could have found that it was possible for respondent to have reached the bearing while standing on the floor, without the use of the defective step, by seizing with his right hand a grab iron located on a nearby column and reaching with his left hand to touch the left end of the bearing, which extended through the bedplate; that this was the usual and only appropriate way to examine the bearing, and that respondent had been seen to reach it in that manner. There was also testimony that other oilers had reached the bearing without using the step while standing on the floor, with right hand grasping the upper edge of the vertical crank-pit guard, which was adjacent on the right and nearer to the bearing than the grab iron. There was evidence of the relative localities of the several parts of the structure mentioned and of the distances between them, indicating that respondent could have reached the bearing, either at its left end or through the hole in the bearing cap, while standing on the engine room floor and without using the step.

We must accept the verdict as establishing the negligent failure of petitioner to furnish a safe appliance, the iron step, and that the plaintiff knew that it was defective at the time of the accident, for the only evidence of any breach of duty by petitioner was respondent's testimony that he knew of the defect and had reported it to the first assistant engineer two or three weeks before the accident. Upon all the evidence it was for the jury to say whether respondent was aware that in reaching the bearing with one hand, either at its end or through the hole in the bearing cap, he could avoid the use of the defective step by standing on the engine room floor and steadying himself by seizing with his right hand the grab iron or the crank-pit guard on his right, or by placing his left hand on the edge of the slush pan.

No specific instruction was asked or given as to what the verdict should be if the jury concluded that respondent had knowingly made such an election. Instead, the court charged generally "that the ship owner is under a duty to furnish the seaman with a safe place in which to work" and "There is no contributory negligence or assumption of risk on the part of a plaintiff in so far as the defendant fails in these duties." Consequently, there is no basis for disturbing the judgment unless this charge is erroneous as applied to the evidence taken most favorably to petitioner.

The question whether assumption of risk is a ba. to a suit by a seaman to recover under the Jones Act for injuries caused by a

defective appliance, when he has a free choice to avoid the use of it, is a novel one in this Court. No such choice was involved in *The Arizona* or *Beadle* cases. There assumption of risk by the seaman, which would have barred recovery at common law, was concededly not a defense under the admiralty rule. The decision was that the Jones Act, in extending to seamen all the rights to recover for injuries resulting from defective appliances given to railway employees by the Federal Employers' Liability Act, 35 Stat. 65, 45 U. S. C. § 51, had left undisturbed the admiralty rule with respect to assumption of risk. In holding that the rule had not been changed, we did not consider the question now presented whether, within that rule, assumption of risk is a defense where the seaman could have avoided the use of the unsafe appliance by the free choice of a safe one.

Before the Jones Act a seaman was entitled to recover, from a vessel or its owner, indemnity for injuries due to an unseaworthy vessel, or for "failure to supply and to keep in order the proper appliances appurtenant to the ship." *The Osceola*, 189 U. S. 158, 175; *The Arizona* v. *Anelich*, *supra*, 120 *et seq.* Contributory negligence, then as now, was not a defense in suits brought by seamen to recover for injuries attributable to defective equipment, but was ground only for mitigation of damages. See *The Max Morris*, 137 U. S. 1; *The Arizona* v. *Anelich*, *supra*, 122, and cases cited. And no American case appears to have recognized assumption of risk as a defense to such a suit. In numerous cases this defense was either denied or ignored in circumstances plainly calling for its application had it been available. *Halverson* v. *Nixen*, Fed. Cas. No. 9,570, 3 Sawy. 562; *The Edith Godden* (D. C.), 23 Fed. 43; *The Noddleburn* (D. C.), 28 Fed. 855; *Olson* v. *Flavel* (D. C.), 34 Fed. 477; *The A. Heaton* (C. C.), 43 Fed. 592; *The Julia Fowler* (D. C.), 49 Fed. 277; *Lafourche Packet Co.* v. *Henderson* (C. C. A.), 94 Fed. 871; *The Fullerton*, 167 Fed. 1; *Globe S. S. Co.* v. *Moss*, 245 Fed. 54; *The Colusa* (C. C. A.), 248 Fed. 21; *Cricket S. S. Co.* v. *Parry*, 263 Fed. 523; *Storgard* v. *France & Canada S. S. Corp.* 263 Fed. 545.

In some of these cases the seaman had voluntarily shipped on a vessel which he knew to be unseaworthy, *Cricket S. S. Co.* v. *Parry*, *supra*; see *Scheffler* v. *Moran Towing and Transportation Co.*, 68 F. (2d) 11, 12. In others it was apparent that the seaman had chosen to expose himself to the dangers of unsafe appliances when there was a safe alternative. *The Julia Fowler*, *supra*; *Olson* v. *Flavel*, *supra*.

In some cases arising after the Jones Act where the defense was allowed, the employee was thought to have had the status of a stevedore or shore worker and not that of a seaman. *The Maharajah*, 40 Fed. 784; *Cunard S. S. Co.* v. *Smith*, 255 Fed. 846; *Hardie* v. *New York Harbor Dry Dock Corp.*, 9 F. (2d) 545; *Skolar* v. *Lehigh Valley R. R. Co.*, 60 F. (2d) 893; *Scheffler* v. *Moran Towing & Transportation Co., supra*, 12; *Yaconi* v. *Brady & Gioe, Inc.*, 246 N. Y. 300, 306. In *Johnson* v. *United States*, 74 F. (2d) 703, the seaman had made his choice in disobedience of orders, and in another where the defense was allowed the seaman, while not on duty, though in the course of his employment, had chosen to go into an unsafe part of the vessel, knowing that there was an alternative. *Helm* v. *Cities Service Co.*, 60 F. (2d) 721.[1]

Here respondent was a seaman; he was on duty when injured; and there was no evidence that he acted in disobedience of orders. In the absence of any controlling or persuasive authority we look to the reason of the admiralty rule of assumption of risk in order to ascertain its appropriate limits. Many considerations which apply to the liability of a vessel or its owner to a seaman for the failure to provide safe appliances and a safe place to work are absent or are of little weight in the circumstances which attend shore employment, in relation to which the common law rules of assumption of risk and contributory negligence have been developed.

The seaman, while on his vessel, is subject to the rigorous discipline of the sea and has little opportunity to appeal to the protection from abuse of power which the law makes readily available to the landsman. His complaints to superior officers of unsafe working conditions not infrequently provoke harsh treatment. He cannot leave the vessel while at sea. Abandonment of it in port before his discharge, to avoid unnecessary dangers of employment, exposes him to the risk of loss of pay and to the penalties for desertion.[2] In the performance of duty he is often under the necessity of making quick decisions with little opportunity or capacity to appraise the relative safety of alternative courses of action.

[1] In Tampa Interocean S. S. Co. v. Jorgensen, 93 F. (2d) 927, the Court of Appeals for the Fifth Circuit, in affirming a judgment in favor of seaman, took occasion to approve the following instruction by the trial court to the jury: "You are instructed that if the plaintiff was furnished two methods of entering the 'tween deck space, one obviously safe and the other obviously unsafe, and if the plaintiff knew the safe method and notwithstanding chose the unsafe method, the defendant is not liable".

[2] See R. S. § 4596, 46 U. S. C. § 701.

Withal, seamen are the wards of the admiralty, whose traditional policy it has been to avoid, within reasonable limits, the application of rules of the common law which would affect them harshly because of the special circumstances attending their calling. *The Arizona* v. *Anelich, supra,* 123, and cases cited; *Calmar Steamship Corporation* v. *Taylor,* 303 U. S. 525. It is for this reason that remedial legislation for the benefit and protection of seamen has been liberally construed to attain that end. *Chelentis* v. *Luckenbach S. S. Co.,* 247 U. S. 372, 380, 381; *Jamison* v. *Encarnacion,* 281 U. S. 635, 639; *Alpha S. S. Corp.* v. *Cain,* 281 U. S. 642; *Cortes* v. *Baltimore Insular Line,* 287 U. S. 367, 375; *Warner* v. *Goltra,* 293 U. S. 155, 157.

Any rule of assumption of risk in admiralty, whatever its scope, must be applied in conjunction with the established admiralty doctrine of comparative negligence and in harmony with it. Under that doctrine contributory negligence, however gross, is not a bar to recovery but only mitigates damages. There being no defense of assumption of risk where the seaman is without opportunity to use a safe appliance, it seems plain that his choice of a defective instead of a safe one, resulting in injury, does not differ in either the quality of the act or in its injurious consequences, in any practical way, from his correspondingly negligent use of a safe or an unsafe appliance, where its use has contributed to an injury resulting from a breach of duty by the owner. See *The Wanderer,* 20 Fed. 140; *The Frank and Willie,* 45 Fed. 494; *John A. Roeblings Sons Co.* v. *Erickson,* 261 Fed. 986, 987; *Storgard* v. *France & Canada S. S. Corp.,* 263 Fed. 545. In either case the seaman's negligence is a contributing cause of his injury, without which the ship owner would be liable to the full extent of the damage.

The incongruity and practical embarrassments in the application of a rule that the negligence in the one case bars recovery, while that in the other only reduces the recoverable damages, are evident. The common law is consistent in holding that both contributory negligence and assumption of risk are defenses. But other considerations apart, it seems inconsistent, and an impracticable refinement, to apply the rule for which petitioner contends in a system of law which maintains the comparative negligence rule to the fullest extent. This was recognized in *Olson* v. *Flavel, supra,* and *The Julia Fowler, supra,* where the choice by the seaman of an unsafe appliance was held not to bar recovery but to be a proper

basis for a substantial reduction of damages because of the negligence of the choice. In *The Julia Fowler, supra,* the eminent admiralty judge, Addison Brown, held that a seaman who had suffered injury through the deliberate use of a halliard known to be defectively spliced when a sound rope was available was entitled to recover, but with diminution of damages because of his negligence in using the unsafe rope.

We think that the consistent development of the maritime law in conformity to its traditional policy of affording adequate protection to seamen through an exaction of a high degree of responsibility of owners for the seaworthiness of vessels and the safety of their appliances will be best served by applying the rule of comparative negligence, rather than that of assumption of risk, to the seaman who makes use of a defective appliance knowing that a safe one is available. The power of the trial judge to guide and instruct the jury and his control over excessive verdicts afford as adequate a protection to owners as in any other case where the negligence of the seaman, whatever its degree, has contributed to an actionable injury.

Upon the facts of this case, there was no error in the charge of the trial court as to assumption of risk. Its instruction as to the application of the rule of comparative negligence was general and no exception was taken to it. Petitioner would have been entitled to a more specific instruction, if requested, as to the appropriate effect upon the amount of the verdict of the relative degrees of petitioner's and respondent's negligence if the jury should find that respondent had knowingly failed to choose an available safe method of doing his work.

We leave to future cases as they may arise the determination of what rule is to apply in cases where the seaman's election to use an unsafe appliance is in disobedience of orders or made while not on duty.

Affirmed.

Mr. Justice McReynolds thinks the petitioner's request for the charge in respect of assumption of risk should have been granted and that, for that reason, the challenged judgment should be reversed.

Mr. Justice Roberts took no part in the consideration or decision of this case.

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Supreme Court of the United States

OCTOBER TERM 1938.

No. 195

SOCONY-VACUUM OIL COMPANY, INC.,
Petitioner,

—against—

HERBERT A. SMITH, JR.,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

HENRY B. POTTER,
Counsel for Petitioner.

LOUIS MEAD TREADWELL,
Of Counsel.

THE COURT PRESS, N. Y. C.

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Supreme Court of the United States

OCTOBER TERM, 1938.

No.

SOCONY-VACUUM OIL COMPANY, INC.,
Petitioner,

—against—

HERBERT A. SMITH, JR.,
Respondent.

Petition for Writ of Certiorari.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully prays for a writ of certiorari to review the decision of the United States Circuit Court of Appeals for the Second Circuit in the above case.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This petition seeks to review a judgment affirming a judgment of the District Court for the Southern District of New York, entered on the verdicts of a jury, for personal injuries alleged to have been sustained by the respondent on June 2, 1935, in the course of his employment as an oiler aboard the petitioner's Steamship "Yankee Arrow".

The action was brought under the Jones Act (Section 33 of the Merchant Marine Act of 1920; U. S. C.

Title 46, Sec. 688) and was based on the alleged negligent failure to provide respondent with a safe place in which to work.

The answer denied generally and pleaded as affirmative defenses Contributory Negligence and Assumption of Risk (R. 8-10).

The Facts.

Respondent was employed as an oiler, working in the engine room of the S. S. "Yankee Arrow", owned and operated by petitioners and bound on a voyage from Baltimore, Maryland, to Beaumont, Texas (R. 35). Shortly before the vessel arrived at Beaumont and on June 2, 1935, respondent claims he tripped on a defective step plate and fell on the floor plates of the engine room. The defect claimed was that a supporting bracket or strut under the step plate was out of place (R. 45, 95). Respondent claims that when he attempted to step down from this step plate, after feeling of the low pressure journal, he was tripped and caused to fall by this supporting bracket (R. 36, 101). His testimony regarding the alleged defect and the cause of his fall is uncorroborated by any one.

Respondent sustained only slight abrasions to the fingers of his left hand and back. He sustained no fractures.

At the time of the accident he was 35 years of age (R. 75) and an experienced oiler (R. 77, 132). He had a high school education (R. 122). He was perfectly familiar with the conditions in the engine room (R. 88). He had performed the same task thousands of times (R. 93). He claims that he knew the step plate had been defective for several weeks (R. 45, 46). He was working under general orders (R. 20, 37). He received no specific

instructions to use the step plate. The step plate was not designed or intended for use while the vessel was at sea (R. 282, 283, 300, 350, 356, 357) but was intended to be used while making repairs in port (R. 282, 285, 300, 347, 357). The petitioner had no reason to anticipate that any one would use this step plate while the vessel was at sea and the engine moving (R. 341). In fact it was not necessary for respondent to use it (R. 283, 300 and 350). A safe method and place was furnished him. He could have stood on the floor of the engine room to perform his task (R. 283, 299, 345, 350, 356, 361).

The First Assistant Engineer never saw respondent or any of the other oilers standing on the step plate to feel the bearing and insists it was dangerous to do so (R. 341 and 350). All of the officers and crew except respondent testified positively that the step plate was not defective; that it never had a supporting bracket under it; that it was held in place by two bolts and that it was not necessary to use it to feel the bearing (R. 266, 267, 277, 283, 301, 333, 337, 348, 357).

The trial court in its charge omitted any reference to the defense of assumption of risk. At the conclusion of the charge the following occurred (R. 419, 420):

> "Mr. Potter: I ask your Honor to charge that if they believe that Mr. Smith, the plaintiff, could have felt the bearing while standing with both of his feet on the floor plate and that it was not necessary for him to stand up on the step plate, he assumed the risk of any injury he may have sustained.
>
> The Court: I refuse so to charge.
>
> Gentlemen, I charge you now that the ship owner is under a duty to furnish a seaman with

a safe place in which to work, give him safe appliances and safe tools, and that is his duty. There is no contributory negligence or assumption of risk on the part of a plaintiff in so far as the defendant fails in these duties.

Mr. Potter: May I have an exception, sir?

The Court: Exception."

The jury returned verdicts for respondent on which judgment was entered (R. 25, 26).

Petitioner's principal contention on appeal to the Circuit Court of Appeals was that respondent, having a choice between an obviously safe and an obviously unsafe method of doing his work, assumed the risk incident to voluntarily selecting the latter.

The Circuit Court of Appeals, after pointing out that "This point was sharply raised by the refusal of the trial judge to recognize assumption of risk as a defense under any circumstances", affirmed the judgment below.

The Question of Law.

In affirming the judgment of the District Court, the Circuit Court of Appeals decided that a seaman who is given a safe place in which to work and voluntarily abandons it for an obviously unsafe place can nevertheless recover under the Jones Act if injury results.

This decision squarely reverses the uniform prior holdings in this and other Circuits.

The Circuit Court of Appeals justified its reversal of the uniform prior holdings by the decision in the *Arizona*[1] and *Beadle*[2] cases in which this Court held

1 *The Arizona* v. *Anelich* (1936), 298 U. S. 110, 80 L. Ed. 1075.
2 *Beadle* v. *Spencer*, (1936), 298 U. S. 124, 80 L. Ed. 1082.

in cases where a seaman had no choice of working places that assumption of risk was no defense to an action for injuries resulting from negligent failure to provide a safe place to work.

Petitioner respectfully contends that this radical change in the law was not justified by the cases cited. In neither case was there any choice of working places or equipment. This Court expressly stated that the Jones Act did not change the previously existing rule as to the availability of assumption of risk as a defense in suits to recover for injuries to seamen.

It had previously been the law that this defense was not available in the circumstances of those cases, since a seaman at sea has no real choice to use or reject the only equipment provided for him.

Where, however, he has a choice between obviously safe and obviously unsafe equipment, the rule has been as uniformly the other way.

Reasons for Allowance of the Writ.

1. The Circuit Court of Appeals for the Second Circuit has decided a question of law of widespread importance to shipowners and operators in a way probably untenable and in conflict with the weight of authority.

2. The decision is in conflict with decisions of the Circuit Courts of Appeals for the Fifth and Ninth Circuits.

3. The decision is probably in conflict with applicable decisions of this Court. In any event, it involves the interpretation of the decisions of this

Court in *The Arizona* v. *Anelich* and *Beadle* v. *Spencer*.

4. The decision conflicts with that of the Circuit Court of Appeals for the Fifth Circuit as to the effect of the decisions of this Court in *The Arizona* v. *Anelich* and *Beadle* v. *Spencer*.

WHEREFORE, your petitioner respectfully prays that a Writ of Certiorari issue to review the decision below.

Dated, July 9th, 1938.

SOCONY-VACUUM OIL COMPANY, INC.,
By HENRY B. POTTER,
Counsel for Petitioner.

LOUIS MEAD TREADWELL,
Of Counsel.

Supreme Court of the United States

OCTOBER TERM 1938.

No.

SOCONY VACUUM OIL COMPANY, INC.,
Petitioner,

—against—

HERBERT A. SMITH, JR.,
Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion of the Court Below.

The opinion of the Circuit Court of Appeals for the Second Circuit in this case is to be found reported in 96 Fed. (2d) 98.

II.

Statement of Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of Congress of February 13, 1925 (U. S. C., Title 28, Section 347). The judgment to be reviewed was filed on April 11, 1938.

III.

Statement of the Case.

The facts, rulings of the courts below and questions presented are set forth in the foregoing petition, pages 1-5 thereof.

IV.

Specification of Errors.

The Circuit Court of Appeals erred in sustaining the refusal of the trial court to submit the issue of assumption of risk to the jury under proper instructions and in affirming the judgment of the District Court.

Summary of Argument.

1. The rules as to the defense of assumption of risk in an action under the Jones Act have been well settled.

(a) A seaman assumes the risks normally incident to his calling.

(b) Because of the peculiar nature of the seaman's relationship with his employers while at sea, he does not assume the risk of negligently unsafe equipment or working place even though such condition is known to him.

(c) Where, however, the seaman voluntarily abandons the safe, for an unsafe, equipment or working place, he assumes the risk incident to such choice.

2. The *Arizona* and *Beadle* cases in no way modified the rules as above stated.

3. The opinion below in stating that "a sailor cannot be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice" creates a new rule of law contrary to the uniform prior holdings.

This new rule is not justified by the *Arizona* and *Beadle* cases, but is contrary to the principles they set forth.

4. The lower court's interpretation of these cases is in conflict with that of the Circuit Court of Appeals for the Fifth Circuit.

5. Improper denial of the defense of Assumption of Risk is not cured by the existence of the defense of Contributory Negligence.

POINT I.

The rules as to the defense of assumption of risk in an action under the Jones Act have been well settled.

(a) A seaman assumes the risk normally incident to his calling.

(b) Because of the peculiar nature of a seaman's relationship with his employers while at sea, he does not assume the risk of negligently unsafe equipment or working place, even though such condition is known to him.

It has always been held that the seaman assumes the risk normally incident to his perilous calling. See *"The Iroquois"*, 194 U. S. 240, 243, 48 L. Ed. 955.

This Court in the case of *The Arizona* v. *Anelich* (1936), 298 U. S. 110, had before it the question as to whether assumption of risk could be interposed as a defense in a Jones Act case to recover damages for injuries to a seaman caused by negligently defective equipment.

No question was involved as to the choice of equipment. The only equipment available for the seaman to use had been found to be negligently defective and the sole question was whether the seaman's knowledge of this condition barred his recovery.

This Court, after an exhaustive review of the authorities, concluded that such defense was not available under these circumstances.

This decision was based on the fact that prior to the Jones Act assumption of risk was not available as a defense in similar cases and that the Jones Act did not "purport to enlarge or modify the defenses

available in maritime law to suits brought to recover for such injuries" This Court pointed out that this conclusion had been reached generally by the lower Federal courts, although not with entire unanimity.

(c) Where, however, the seaman voluntarily abandons the safe, for the unsafe, equipment or working place, he assumes the risk incident to such choice.

In the case of *Hardie* v. *New York Harbor Dry Dock Corporation,* 9 Fed. (2nd) 545 (C. C. A. 2nd 1925), action had been brought under the Jones Act for injuries and death resulting from a seaman falling into a coal bunker. It appeared that the deceased, in going aft to perform his work, had two routes open to him, one over a lighted deck, the other through a dark passageway. He chose the latter and, in the darkness, tripped over a pipe and fell into the coal bunker.

The District Court had dismissed the complaint. In the course of its opinion affirming the judgment, the Appellate Court said at page 546:

> "If there be two ways, one safe and the other dangerous, the servant chooses the dangerous way at his peril, if the difference is known to him. *Beulah Coal Co.* v. *Verburgh,* 292 F. 34 (C. C. A. 8); *Williams Cooperage Co.* v. *Headrick,* 159 F. 680, 86 C. C. A. 548 (C. C. A. 8); *The Indrani,* 101 F. 596, 41 C. C. A. 511 (C. C. A. 4)."

In *Holm* v. *Cities Service T. Co.,* 60 Fed. (2nd) 721 (C. C. A. 2nd 1932), the same Court states the rule as follows, at page 723:

> "* * * That a seaman does not assume the risk of injury caused by the unseaworthiness of the

ship or defective appliances even though known to him, *Cricket S. S. Co.* v. *Parry* (C. C. A.) 263 F. 523, is not decisive in this case. Of course, seamen on duty must use what is furnished for their use because they cannot quit, and shipowners cannot relieve themselves of liability to their seaman for injuries caused by the unseaworthiness of their ships or defective appliances which they require seamen with no real choice in the matter to use. But this doctrine is not to be pressed to the point where a seaman not acting under orders is relieved of the risks incident to his employment which are known and obvious to him. To this extent it has long been a part of the maritime law that seamen do assume the obvious or known risks of their employment."

Similarly, in *Scheffler* v. *Moran Towing and Transportation Co.*, 68 Fed. (2nd) 11 (C. C. A. 2nd 1933), the court said at page 12:

"It is indeed true in general that a seaman at sea does not assume the risk of any unseaworthiness, though it be known to him when he embarks. * * * This does not however excuse him when he has an alternative. * * *"

In *Johnson* v. *U. S.*, 74 Fed. (2nd) 703 (C. C. A. 2nd, 1935), the Court stated the rule very clearly at page 704:

"A seaman to whom two ways were available, one dangerous and the other safe, assumed whatever risk was involved in taking the dangerous course when he selected it through his personal choice and not because of any compulsion or ignorance of the situation."

In *Hunt* v. *Hobbs Wall & Co.*, 42 Fed. (2nd) 437 (C. C. A. 9th, 1930), the seaman was killed by falling

from a beam on which he was standing while attempting to free a timber being hoisted from the hold the court affirmed the holding of the District Court that there was no liability, in the following language at page 438:

> "The Proctors have shown commendable industry and zeal in marshalling the authorities on the subject of assumption of risk, on seaworthiness, negligence, etc., but after all is said and done the simple fact remains that this beam was not intended as a place to work, its situation was obvious, its dangers, such as they were, clearly manifest; the decedent was neither directed to use the beam nor did his duties necessarily require him to do so."

In *Tampa Interocean S. S. Co.* v. *Jorgensen*, 93 Fed. 2nd, 927 (C. C. A. 5th, 1938), the Court held at page 930 that the following charge given by the District Court was not erroneous:

> "You are instructed that if the plaintiff was furnished two methods of entering the 'tween-deck space, one obviously safe and the other obviously unsafe, and *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method the defendant is not liable."

POINT II.

The Arizona and _Beadle_ cases in no way modified the rules as above stated.

The Arizona v. *Anelich, supra,* involved an action to recover damages for injuries and death of a seaman caused at sea by a defective power winch he was using in the course of his employment. There was no suggestion that any other equipment was

available or that he had any choice except to use the particular equipment given him. The case had been initiated in the State Courts of Washington and the State Supreme Court, in sustaining the judgment of the trial court, held that *in the circumstances disclosed* assumption of risk was not a defense in a suit under the Jones Act.

Beadle v. *Spencer* (1936), 298 U. S. 124, involved an action under the Jones Act for injuries to a seaman who fell into an open hatch while engaged in unloading lumber.

While appellants apparently sought to raise a question as to the seaman's employing a dangerous method while a safe one was available, this Court in disposing of this point at page 130 says:

> "Respondent was using the defectively piled lumber as a platform on which to stand when adjusting the sling under some of the lumber about to be unloaded. There is no suggestion in the evidence or by petitioner's requests that he could have stood elsewhere when performing that operation, *or that he had any choice but to do his work there or leave the vessel.*" (Italics ours.)

This Court was concerned principally in the *Beadle* case with disposing of the contention that the rule should be different because the ship was engaged in coastwise trade and was in port rather than at sea.

In neither of the above cases did the seaman have a choice between a safe and an unsafe method or working place. In neither opinion were the cases establishing the rule heretofore discussed cited or referred to in any way.

The effect of the *Arizona* and *Beadle* cases was to clarify the rule already recognized by most Federal courts, that in a case where no choice is available, a seaman injured by negligently defective equipment can not be met by the defense that since he knew of the defects he assumed the risk and can not recover. It is made perfectly clear that the reason for this rule is the lack of any real choice on the part of the seaman to use or decline to use the only equipment provided for him.

POINT III.

The opinion below, in stating that "a sailor can not be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice", creates a new rule of law contrary to the uniform prior holdings.

This new ruling is not justified by the *Arizona* and *Beadle* cases but is contrary to the principles they set forth.

The Court below in the instant case recognized that petitioner's contention that the lower court should have submitted to the jury the effect of respondent's abandoning an obviously safe place to do his work in favor of an obviously unsafe place, was sharply raised by the refusal of the trial judge to recognize assumption of risk as a defense under any circumstances.

The Court then proceeded to squarely determine this question by affirming the judgment and ruling that a sailor can not be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice.

The only cases the Court discusses in reaching this conclusion are the *Arizona* and *Beadle* cases. The Court acknowledges that these decisions were not rendered in cases where the seaman had a choice of places within which to work or of equipment for use in his work. The Court cites no case, nor has petitioner been able to find any case, where this question of choice was raised, which gives any support to the ruling announced.

Since the *Arizona* and *Beadle* cases did not involve a choice of methods and did not cite or refer to the long line of cases establishing assumption of risk where such choice exists, Petitioner respectfully urges that the decisions in the *Arizona* and *Beadle* cases in no way justify the ruling stated by the Circuit Court of Appeals for the Second Circuit in the instant case.

POINT IV.

The lower court's interpretation of these cases is in conflict with that of the Circuit Court of Appeals for the Fifth Circuit.

The case of *Tampa Interocean S. S. Co.* v. *Jorgensen, supra,* was decided by the Circuit Court of Appeals for the Fifth Circuit in 1938. Although the opinion refers specifically to the decisions of this Court in the *Arizona* and *Beadle* cases, it is nevertheless obvious that that Court does not construe those cases as eliminating assumption of risk when the seaman voluntarily chooses the unsafe method.

In that case the plaintiff had received injuries by falling through a hatchway. Plaintiff recovered and the judgment was affirmed by the Circuit Court of Appeals. After referring to the decisions in the *Arizona* and *Beadle* cases, the Circuit Court of Ap-

peals for the Fifth Circuit goes on to quote with approval the language in the *Hardie* case, *supra*, that

> "If there be two ways, one safe and the other dangerous, the servant chooses the dangerous way at his peril, if the difference is known to him."

The Court concludes its opinion with the ruling that the District Judge was correct in charging as follows:

> "You are instrueted that if the plaintiff was furnished two methods of entering the 'tween-deck space, one obviously safe and the other obviously unsafe, and *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method the defendant is not liable."

The case of *American Pacific Whaling Company* v. *Kristensen*, 93 Fed. (2nd) 17 (C. C. A. 9th. 1937), was a Jones Act case decided subsequent to the *Arizona* and *Beadle* cases. The opinion refers specifically to these cases as authority for the ruling that assumption of risk is not a defense under the Jones Act. The Court accordingly affirmed a ruling of the District Judge, refusing to admit any evidence in support of assumption of risk.

An examination of the opinion, however, indicates that no question was raised in that case of any choice of equipment. The seaman was injured by a defective whaling-gun. There is no evidence that he had any choice between this and any other whaling-gun.

The decision of the Circuit Court of Appeals for the Ninth Circuit, therefore, is ambiguous and supports neither the interpretation placed by the Second Circuit, nor that placed by the Fifth Circuit upon the decisions of this Court in the *Arizona* and *Beadle* cases.

POINT V.

Improper denial of the defense of assumption of risk is not cured by the existence of the defense of contributory negligence.

The Court below in the instant case cites a growing tendency to limit the defense of assumption of risk and states that the penalty on the seaman for his carelessness in choosing the unsafe method is an abatement of his recovery in proportion to his own contributory negligence.

It is submitted, however, that the existence of the defense of contributory negligence to the extent of mitigating the damages is not an adequate substitute for the defense of assumption of risk. It is entirely conceivable that a seaman who has abandoned a safe working place for an obviously unsafe one may conduct himself with extreme care and still be injured because of the dangers inherent in the place he has chosen to work in, merely to save his own time or show his contempt for safety devices, or for some other reason.

That assumption of risk and contributory negligence are separate and distinct defenses is pointed out by Judge Hough in *McAdoo* v. *Anzellotti*, 271 Fed. Rep. 268 (C. C. A. 2nd, 1921).

CONCLUSION.

For the reasons stated, and on the authority of the cases cited, it is respectfully submitted that the petition should be granted.

HENRY B. POTTER,
Counsel for Petitioner.

LOUIS MEAD TREADWELL,
Of Coynsel.

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Supreme Court of the United States

OCTOBER TERM 1938

No. 195

SOCONY-VACUUM OIL COMPANY, INC.,
Petitioner,

against

HERBERT A. SMITH, JR.,
Respondent.

BRIEF FOR PETITIONER

LOUIS MEAD TREADWELL,
Attorney for Petitioner.

HENRY B. POTTER,
JOHN J. MANNING,
Of Counsel.

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Supreme Court of the United States

OCTOBER TERM 1938

No. 195

SOCONY-VACUUM OIL COMPANY, INC.,

Petitioner,

against

HERBERT A. SMITH, JR.,

Respondent.

BRIEF FOR PETITIONER

Opinion of the Court Below

The opinion of the Circuit Court of Appeals for the Second Circuit (R. 261-266) is reported at 96 Fed. (2d) 98.

Jurisdiction of this Court

A petition for a writ of certiorari was filed July 11, 1938 (R. 272) and was granted by this Court on October 10, 1938 (R. 269). Jurisdiction of this Court is under Section 240 (a) of the Judicial Code as amended by the Act of Congress of February 13, 1925 (U.S.C.A. Title 28, Section 347).

Statement of the Case

By this writ the petitioner seeks to review the judgment of the United States Circuit Court of Appeals for the Second Circuit, filed April 11, 1938, affirming the judgment of the District Court for the Southern District of New York, entered on the verdict of a jury.

The action was brought by the respondent (plaintiff below) who was employed as an oiler aboard the S.S. Yankee Arrow, owned and operated by the petitioner (defendant below). The respondent sought recovery for personal injuries alleged to have been sustained during such employment by reason of petitioner's negligence (R. 2-5).

The action was brought under the Jones Act,[1] alleging three causes of action. The first cause of action is for compensation for personal injuries caused by alleged negligent failure of the petitioner to provide the respondent with a safe place in which to work (R. 2). The second cause of action was withdrawn at the close of the respondent's case (R. 106). The third cause of action is for maintenance and cure (R. 5).

The petitioner's answer denies generally and pleads as affirmative defenses contributory negligence and assumption of risk (R. 5-7).

At the close of the respondent's case (R. 106), and again at the close of the entire case (R. 231-232), the petitioner moved to dismiss the first and third causes of action. Both motions were denied and the petitioner duly excepted (R. 232).

The Court submitted both causes of action to the jury. Under the first cause of action the Court gave instructions

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[1] Section 33 of the Merchant Marine Act of 1920; U.S.C.A. Title 46 Sec. 688.

as to negligence and contributory negligence (R. 234-240), but refused to give the petitioner's requested instruction on assumption of risk (R. 243). The jury rendered a verdict on the first cause of action for $5,000 and on the third cause of action for $535 (R. 244). The petitioner moved to set aside the verdict and for a new trial, which motions were denied and the petitioner duly excepted (R. 245). Judgment was thereupon entered for the respondent on the verdicts (R. 16-17) and the petitioner appealed to the Circuit Court of Appeals for the Second Circuit (R. 253-254).

The Facts

On June 2, 1935 during the four to eight P. M. watch, the respondent was performing his duties as oiler in the engine room of the petitioner's vessel which was then off the Florida coast on a voyage from Baltimore, Maryland, to Beaumont, Texas (R. 23, 249).

The ship was a modern one, equipped with automatic lubrication (R. 63, 108), and it was a part of the respondent's duties as oiler to feel of the low pressure bearing about every twenty minutes to learn by its temperature whether it was receiving proper lubrication (R. 24). At about 5:30 P. M., and immediately after having felt the low pressure bearing for the purpose stated, the respondent fell to the floor of the engine room and hurt himself. No one saw him fall. The respondent testified that he had climbed up onto a step-plate and a bearing support in order to feel the bearing and that in stepping down again he was caused to fall by tripping over a loose supporting bracket which projected from under the step-plate which was itself loose (R. 25). He said that the step-plate and the bracket had been in this condition to his

knowledge for several weeks (R. 29-30). All of the other witnesses testified that the step-plate was in perfect order and had never had a supporting bracket beneath it (R. 134, 158, 181, 184, 199).

Respondent suffered abrasions on his back and left index finger (R. 249-251). He had no fractures (R. 19). There was a sharp conflict in the evidence as to the extent of his incapacity resulting from these injuries (R. 238).

The respondent testified that he always used the step-plate in feeling the low presure bearing and that he could not reach the bearing while standing on the floor-plates (R. 62-63). This testimony was not corroborated. All of the other witnesses testified that the step-plate was not intended for use while the vessel was at sea or the engines in operation and that to use it under such conditions was extremely dangerous (R. 194). They testified that the step-plate was intended for use when the vessel was in port and the engines not in operation in order to reach overhead in taking down and repairing the engines (R. 146, 157, 192, 199).

Witnesses called by the petitioner testified without contradiction that the proper, usual and safe method of feeling the low pressure bearing was to stand on the floor-plates, grasp with the right hand a hand-rail, or grab-iron, provided for the purpose and touch the end of the bearing with the fingers of the left hand (R. 147, 157, 187, 198).

The respondent testified that if he grasped the grab-iron with his right hand he could not reach the bearing with his left (R. 31), although it was undisputed that the respondent had a reach of 61 inches (R. 53-54) and the distance from the grab-iron to the bearing was 43½ inches, there being no obstructions between (R. 198, 248).

The respondent was working under general orders (R. 13, 24). No specific instructions were given to the oilers on the petitioner's vessel, but the engineer in charge of the watch would observe the manner in which the oiler did his work and correct him if he did anything improperly (R. 187, 189). The third engineer who was in charge of the respondent's watch testified that he had observed the respondent feel the low pressure bearing and that the respondent always did it while standing on the floor-plates (R. 187, 190).

The respondent was an experienced oiler and had felt this particular bearing a great many times (R. 21, 24, 53, 65). It is his contention that he stood with his right foot on the loose step-plate, his left foot on the bearing support, which was about a foot forward of the step-plate and about a foot higher, held on to the slush-pan with his left hand, which would then have been about knee-high, to his left and opposite his right foot, and then reached forward with his right hand to feel the bearing which would then have been about a foot forward of his left foot, and somewhat below it (R. 27, 201, 247, 248).

The respondent was thus balanced precariously on a loose step-plate, with moving machinery below him on both sides (R. 247).

The petitioner could not anticipate that respondent, who was an experienced oiler, would occupy such an awkward and hazardous position in doing his work while the vessel was at sea and the engines in operation.

No representative of the petitioner ever saw the respondent or any other seaman occupy such a position under such circumstances (R. 187).

Petitioner's Contention Below

It was the petitioner's contention that the respondent should have felt the bearing in the usual manner while standing on the floor-plates and holding on to the grab-iron, which provided him with a safe place in which to do his work, and that when he voluntarily abandoned this safe place and climbed up on the step-plate and bearing support, which under the circumstances was a very dangerous place, he assumed the risks involved in that choice, one of which was the risk of falling over the defective brace, which he says he had known was defective for a period of weeks.

The Rulings Below

The petitioner sought to have this issue submitted to the jury by asking the District Court to charge the jury that, if they believed that the respondent could have felt the bearing while standing with both of his feet on the floor and that it was not necessary for him to climb up on the step-plate, he assumed the risk of the injury he sustained. The District Court refused so to charge (R. 243). The point was also raised by motion to dismiss the first cause of action, which motion was denied (R. 231-232).

The Circuit Court of Appeals, after pointing out that, "This point was sharply raised by the refusal of the trial judge to recognize assumption of risk as a defense under any circumstances" (R. 263), affirmed the judgment below (R. 266). The Court recognized previous holdings to the effect that a seaman who has a choice between an obviously safe and an obviously unsafe place in which to work and voluntarily selects the latter assumes the risk incident to

that choice. The Court held, however, that the decisions of this Court in the *Arizona*[1] and *Beadle*[2] cases required a reversal of this ruling (R. 265).

Petitioner's Contention on this Appeal

It is the petitioner's contention on this appeal that by the decisions referred to this Court merely clarified and affirmed the rule previously established in most of the lower Federal courts that a seaman who has no real choice to use or refuse to use the equipment or working place provided for him at sea can not be held to assume the risk merely because the unseaworthiness or defective condition is known to him.

It is the petitioner's contention, further, that this rule, based as it is on the seaman's lack of any real choice, should not apply to a situation where the seaman does have a choice and voluntarily selects the dangerous working place. In the latter case, the established rules of assumption of risk should apply.

The Assigned Errors to be Urged

The petitioner respectfully urges that the Circuit Court of Appeals erred in sustaining the refusal of the trial court to dismiss the first cause of action or to submit the issue of assumption of risk to the jury under proper instructions and in affirming the judgment of the District Court. On appeal to the Circuit Court of Appeals, the petitioner specifically assigned as error the District

[1] *The Arizona* v. *Anelich* (1936), 298 U. S. 110, 80 L. Ed. 1075.
[2] *Beadle* v. *Spencer* (1936), 298 U. S. 124, 80 L. Ed. 1082.

Court's refusal to dismiss the first cause of action on the ground of assumption of risk and the District Court's refusal to charge as requested on the issue of assumption of risk (Assignments 1, 2, 5 and 18b, R. 254, 259).

Summary of Argument

I. The rules as to the defense of assumption of risk in an action under the Jones Act have been well settled (*post*, pp. 10-17).

(a) A seaman assumes the risks normally incident to his calling.

(b) Because of the necessarily rigid discipline of the sea and the absence of any real choice to use or refuse to use the only equipment or working place available to him, a seaman does not assume the risk of an unseaworthy ship or negligently defective equipment, even though such condition is known to him.

(c) Where, however, the seaman voluntarily abandons the safe for the unsafe equipment or working place, he assumes the risk incident to such choice.

II. The *Arizona* and *Beadle* cases in no way modified the rules as above stated (*post*, pp. 18-20).

(a) Those cases involved no choice on the part of the seaman.

(b) The opinions did not discuss the cases establishing the "choice" rule.

(c) The opinions show no intention to reverse the rules of assumption of risk theretofore generally applicable.

(d) The Circuit Court of Appeals for the Fifth Circuit did not so interpret the opinions.

III. The opinion below, in stating that "a sailor can not be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice" would create a new rule of law contrary to the uniform prior holdings (*post*, pp. 20-22).

IV. Improper denial of the defense of assumption of risk is not cured by a correct instruction on contributory negligence (*post*, p. 23).

V. The law is and should remain that the seaman assumes the risks that he takes unnecessarily and as a matter of his own free choice (*post*, pp. 24-25).

(a) The law should require a ship-owner to exercise every precaution to provide a seaworthy ship and safe equipment. The law should also require a seaman to take every reasonable precaution for his own safety.

(b) The law should discourage the well-known tendency of seamen to take unnecessary risks.

1. through disregard for their own safety,
2. to save time or effort, or
3. to show contempt for safety devices.

POINT I.

The rules as to the defense of assumption of risk in an action under the Jones Act have been well settled.

It has always been held that the seaman assumes such risks as are normally incident to his perilous calling. This was so before the Jones Act and the rule was not changed by the passage of that statute.[1]

While authorities have differed in exact definition of assumption of risk, and particularly in distinguishing it from contributory negligence, it is fundamental that assumption of risk must be voluntary.

It has been said:

> "* * * a risk must be voluntarily assumed to relieve the master from liability. Risks incurred under coercion are not assumed. * * *. If, therefore, he continues to incur the risk of such defects, under any kind of necessity or coercion, he does not voluntarily assume the risk, and is not necessarily debarred from recovery thereby."[2]

A master of a vessel at sea has necessarily drastic powers to enforce discipline on his ship. To compel obedience he may inflict corporal punishment or imprison or confine the seaman.[3]

Unlike a servant on land, therefore, a seaman who is ordered to use defective equipment or whose general orders require such use has no real choice in the matter

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[1] *The Arizona* v. *Anelich, supra.*

[2] *Shearman & Redfield on Negligence,* Vol. I (6 ed.), Sections 207(h) and 211(a).

[3] *Panama R. Co.* v. *Johnson* (C.C.A. 2nd, 1923), 289 Fed. 964. Affirmed (1924) 264 U. S. 375, 68 L. Ed. 748.

and can not be said to assume the risk incident to the defect merely because he knows of it.

This is "but another application of the principle that a man does not assume a risk forced upon him . . . the element of coercion . . . is the basis of the modification of the common-law rule as found in maritime law."[1]

In the *Arizona* case, *supra*, this Court, after a complete review of the authorities in cases where the seaman, in carrying out direct or general orders, necessarily used defective equipment, held that in such a case the defense of assumption of risk is not available.

This Court pointed out that this was the conclusion reached generally by the lower Federal courts, both before and after the passage of the Jones Act.

Where, however, conditions on board ship are such that the seaman has complete freedom of choice to take or avoid an obvious and known risk, there is every reason for the application of the principle of assumption of risk.

Such is the case where the seaman has alternative routes or pieces of equipment, one of which he knows to be safe and the other he knows to be unsafe; or where the seaman voluntarily abandons a safe and proper working place and selects, for some reason of his own, an unusual and obviously unsafe working place, which selection the ship-owner could in no way anticipate.

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[1] See *Holm* v. *Cities Service Transp. Co.* (C.C.A. 2nd, 1932), 60 Fed. (2d) 721, 723, and *State S.S. Co.* v. *Berglann* (C.C.A. 9th, 1930), 41 F. (2d) 456, cert. den. (1930), 282 U. S. 868, 75 L. Ed. 767, where the Court says, "The doctrine of assumption of risk has long been applied to the cases of seamen; its application has been made with reference to the peculiar nature of the seaman's employment, his subjection to orders, and inability to abandon his employment during a voyage."

A number of Federal courts over a period of years have recognized this situation and ruled that in such a case the seaman does assume the risks which he incurred voluntarily and not under the compulsion of either direct or general orders.

The Circuit Court of Appeals for the Second Circuit had such a case before it in *Holm* v. *Cities Service Transp. Co.*[1] In that case plaintiff was employed as third mate on a tank-vessel which at the time involved was loading oil in a foreign port. While plaintiff was in charge of the loading operations various leaks occurred, resulting in pools of oil on the deck. This was usual and to be expected. Plaintiff went off watch and a few hours later went aft by way of the flying bridge to get a drink of water. Returning by the shorter route, along the deck, he stepped in one of the pools of oil, fell and was hurt. Plaintiff sued under the Jones Act, recovered a judgment and the defendant took an appeal.

The Circuit Court of Appeals felt that the jury had properly found defendant guilty of negligence in failing to remove the oil which accumulated on the deck during the loading. Since, however, plaintiff had reason to believe that there was oil on the deck and voluntarily selected the shorter though more dangerous return route, the Court felt that assumption of risk should be a defense if that defense is ever available in a Jones Act case.

The Court's analysis of the principles involved, leading to the conclusion that the defense was available on the facts stated, was as follows:

> "Where a seaman is injured when acting under orders, he does not assume the risk • • • his

[1] *Supra.*

> duty to obey the order of a superior is so compelling that a rule of law based on the maxim 'volenti non fit injuria' can not be applied. Where the conduct of the injured seaman, however, is induced only by his own free will, and he acts to his injury at a time and place when he is free to choose between doing what is safe and what is known to him to be dangerous, he is obviously under no more compulsion than is an employee on land. * * *
>
> "That a seaman does not assume the risk of injury caused by the unseaworthiness of the ship or defective appliances, even though known to him, * * * is not decisive in this case. Of course, seamen on duty must use what is furnished for their use because they can not quit, and ship-owners can not relieve themselves of liability to their seamen for injuries caused by the unseaworthiness of their ships or defective appliances which they require seamen with no real choice in the matter to use. But this doctrine is not to be pressed to the point where a seaman not acting under orders is relieved of the risks incident to his employment which are known and obvious to him."

The same court had the point up again in *Johnson* v. *United States*.[1] This was a libel in admiralty to recover damages for the death of a seaman who had been swept overboard during heavy weather in the Indian Ocean. The deceased, with several other seamen, was crossing the after well-deck on his way to supper when a wave washed across the deck and carried him overboard. He was subsequently rescued, but died of the injuries he received.

There was an alternative route available through a shaft alley below deck. The crew had been given general

[1] (C.C.A. 2nd, 1935), 74 Fed. (2d) 703.

admonitions not to go over the exposed deck during rough weather but instead to use the shaft alley.

The trial court held the respondent guilty of negligence in failing to rig life-lines on the well-deck, but halved the damages because it found the decedent negligent in choosing a path which was obviously fraught with danger when there was another means available to him of which he knew.

The Circuit Court of Appeals reversed the decree and dismissed the libel on the ground that the deceased seaman by his voluntary selection of the route he knew to be dangerous assumed the risk. The Court said:

> "A seaman to whom two ways were available, one dangerous and the other safe, assumed whatever risk was involved in taking the dangerous course when he selected it through his personal choice and not because of any compulsion or ignorance of the situation. To find him negligent in crossing the well-deck, as the trial judge did, and at the same time to hold that he did not assume the risk of such an obviously unsafe passage, was quite contrary to the whole doctrine of assumption of risk applicable to such cases and explained in our recent decision[1] • • • where the very question we have here arose."

In *Scheffler* v. *Moran Towing and Transportation Co.*[2] the libelant was a cook, employed on one of respondent's harbor tugs. The libelant was a day-time employee only and, when necessary, served in the double capacity of cook and deck-hand. On the day in question, the tug was short handed, as the libelant knew when he went on board in

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[1] *Holm* v. *Cities Service Transp. Co., supra.*

[2] (C.C.A. 2nd 1933), 68 Fed. (2d) 11.

the morning, and the libelant was called upon to tend certain lines when the tug went to pick up some scows. In the course of this operation he got his leg caught in the bight of a towing strap and was injured. The District Court found that the shorthandedness of the tug rendered her unseaworthy and, accordingly, entered a decree for the libelant.

The Circuit Court of Appeals reversed the decree because the libelant assumed the risk of the tug's shorthandedness. The Court put this on two grounds: first, that the defense is available where a seaman has an alternative and, second, that libelant being a day-time employee[1], the defense was available in his case in any event. On the first point, the Court stated the law as follows:

> "It is indeed true in general that a seaman at sea does not assume the risk of any unseaworthiness, though it be known to him when he embarks. * * * This does not however excuse him when he has an alternative * * *."

The Circuit Court of Appeals for the Ninth Circuit in 1930 had before it a case[2] where a seaman had been killed by falling from a beam on which he was standing while attempting to free a timber being hoisted from the hold. Suit had been brought alleging negligence in the installation and maintenance of the beam.

The Court in affirming the holding of the District Court that there was no liability, used the following language:[3]

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[1] See also *Skolar* v. *Lehigh Valley R. Co.* (C.C.A. 2nd, 1932), 60 Fed. (2d) 893.

[2] *Hunt* v. *Hobbs, Wall & Co.* (C.C.A. 9th, 1930), 42 Fed. (2nd) 437.

[3] At page 438.

> "The Proctors have shown commendable industry and zeal in marshaling the authorities on the subject of assumption of risk, seaworthiness, negligence, etc., but, after all is said and done, the simple fact remains that this beam was not intended as a place to work, its situation was obvious, its dangers, such as they were, clearly manifest; the decedent was neither directed to use the beam nor did his duties necessarily require him to do so. If he had taken a half hitch of the bight of the rope around one end of the timber they were raising, or bent the rope nearer the end, it would have been entirely unnecessary to use the beam to free the timber. * * * Such risk as was involved in the use of the beam by the decedent was unnecessary and upon well established principles was assumed by him."

In the Fifth Circuit the point was recently discussed in *Tampa Interocean S. S. Co.* v. *Jorgensen*[1]. In that case the Circuit Court of Appeals affirmed the judgment of the District Court in favor of the injured seaman. There was evidence that the seaman had an alternative between a safe and an unsafe route, but it also appeared that he did not know either that there was an alternative or that the way he chose was unsafe. It further appeared that the way he chose was the usual and natural route and that he really made no choice. The District Court had submitted the issue to the jury in the following language:

> "You are instructed that if the plaintiff was furnished two methods of entering the 'tween-deck space, one obviously safe and the other obviously unsafe, and *if the plaintiff knew the safe method* and notwithstanding chose the unsafe method the defendant is not liable."

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[1] (C.C.A. 5th, 1938), 93 Fed. 2nd, 927. Cert. denied May 2, 1938, 82 L. Ed. 860, 58 S. C. 949.

The Circuit Court of Appeals (Fifth Circuit) after discussing the *Arizona* and *Beadle*[1] cases ruled that under the circumstances the District Court's charge correctly stated the law.

Petitioner has found no case other than the decision now appealed from contrary to the principles so clearly established by the opinions referred to in the Second, Fifth and Ninth Circuits.

The application of these principles to the case at bar seems clear. Paraphrasing the language of the Circuit Court of Appeals for the Ninth Circuit[2], there was evidence on which the jury in our case might have found

> "• • • that this *step-plate* was not intended as a place to work, its situation was obvious, its dangers, such as they were, clearly manifest; the *respondent* was neither directed to use the *step-plate* nor did his duty necessarily require him to do so."

Whereupon the Court should have held (again paraphrasing) that:

> "• • • Such risk as was involved in the use of the *step-plate* was unnecessary and upon well established principles was assumed by him."

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[1] *Supra.*

[2] *Hunt* v. *Hobbs, Wall & Co., supra.*

POINT II

The *Arizona* and *Beadle* cases in no way modify the rules as above stated.

In the *Arizona* case[1], the seaman had been injured at sea while engaged in hauling in with a power-winch the purse line of a fishing net. In some manner his leg became entangled in the purse line, and, before the winch could be stopped, his leg was drawn on to the drum and he received injuries which resulted in his death.

It was claimed that, through defendant's negligence, a clutch was defective, making it impossible to stop the engine in time to avoid the injury.

The trial court refused to charge that voluntary assumption of risk by decedent was a defense. There was no suggestion that decedent had any alternative or that it was not necessary in performing his duties to use the defective equipment provided for him.

In the *Beadle* case[2], the seaman was injured by a fall into an open hatch while engaged in unloading lumber from the deck. In performing this work, he had been standing on a pile of boards. There was evidence that these boards were, through negligence, piled in such an unstable way in proximity to the open hatch as to provide an unsafe place for the seaman to work.

The petitioner had requested a charge that if the jury should find that respondent, in placing the sling underneath the lumber, "chose to perform the act in a dangerous manner, such as stepping too near the edge of the deck load when there was a safe method of doing the

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[1] *Supra.*
[2] *Supra.*

work involving no risk of the edge of the deck load giving away, then the plaintiff can not recover". However, this Court pointed out, in upholding the denial of that request to charge, that, "There is no suggestion in the evidence or by petitioner's requests that he could have stood elsewhere when performing that operation, or that he had any choice but to do his work there or leave the vessel."

In neither the *Arizona* nor the *Beadle* case did this Court in its opinion refer to the cases discussed *supra* establishing the rule where the seaman, of his own free choice, takes an unnecessary risk.

In none of the cases cited and discussed in the opinions which deny the defense of assumption of risk has such a factual situation been found.

Nothing in either opinion justifies the conclusion that this Court intended to reverse the rule so clearly developed in the "choice" cases. The conclusion that assumption of risk is not a defense in cases of the type this Court was considering is based clearly on the principles quite generally established in the lower courts. These, in turn, were based on the fundamental principle that assumption of risk must be voluntary, and that the denial of that defense in maritime cases is coextensive with the absence of free choice and the presence of coercion in these cases.

The Fifth Circuit Court of Appeals in the *Jorgensen* case[1], evidently found nothing in the *Arizona* or *Beadle* opinions to alter the application of the "choice" rule which the lower court in that case had so clearly stated to the jury.

The Court, after stating the applicable principles of law established by the *Arizona, Beadle* and other cases,

[1] *Supra.*

said that the lower court had "charged fully the law as we have stated it."

The Court had particular reference to the lower court's instruction already quoted[1] that

> "* * * if the plaintiff was furnished two methods of entering the 'tween-deck space, one obviously safe and the other obviously unsafe, and if the plaintiff knew the safe method and notwithstanding chose the unsafe method the defendant is not liable."

POINT III

The opinion below creates a new rule of law contrary to the uniform prior holdings.

The Court below cites no authority *extra* the *Arizona* and *Beadle* opinions which is claimed directly or by analogy to justify the rule announced.

As previously pointed out, the petitioner has found no prior case which questions the authority or the soundness of the "choice" rule.

The Court below states its conclusion as follows:

> "In view of what the Supreme Court has said[2] and the growing tendency to limit the defense of assumption of risk, and when indemnity is allowed, to apportion damages according to fault rather than to bar them altogether, we feel confident that a sailor can not be expected to weigh alternatives when doing his work at the expense of losing all rights to recover if he has made a careless choice" (R. 265).

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[1] *Supra*, p. 16.

[2] In the *Arizona* and *Beadle* opinions, *supra*.

If by "a careless choice" the Court means negligence, the statement is correct but does not justify the decision in this case. To make the language applicable, it should be not "a careless choice" but *"a voluntary and deliberate choice involving a known danger."*

A sailor must always "weigh alternatives" to the extent of deciding whether he shall abandon the safe and proper working place the ship provides in favor of some unusual and obviously dangerous working place. If the jury find, on proper instructions, that the selection was voluntary and the risk obvious and known then it should not shock the Court that the sailor by making such "a careless choice" loses any right to recover from the master for the resulting injury.[1]

While the Court below stresses that the language in the *Arizona* and *Beadle* opinions is "general and sweeping", in precluding assumption of risk as a defense in this type of action, it is not suggested that that defense is entirely eliminated.

It is clear that a seaman does assume the risks normally incident to his perilous calling. Furthermore, the Court below said:

> "We do not, however, suggest that a seaman who uses a defective appliance or chooses an unsafe place to work, contrary to orders, could recover indemnity from his employer on any theory, and our decision in *Johnson* v. *United States* * * * may be sustained because the seaman there was given orders not to go to his mess-room over an exposed deck but to take a shaft tunnel in rough weather" (R. 265).

By referring to the opinion in the *Johnson* case, it appears that the "orders" referred to amounted merely to

[1] See footnote 3, *post*, p. 24.

"general admonitions" to the crew that the open deck was dangerous and the shaft tunnel should be used in rough weather.

In any event, the distinction appears unsound. The significance of the "general admonitions" was in establishing (1) that the seaman knew of the risk and (2) that he was not coerced into incurring it but did so voluntarily.[1]

Where these two elements are present there is every reason for allowing the defense of assumption of risk. No authority has been found for limiting it to situations where the seaman actually disobeys orders.

Where the servant is ignorant of the danger there may be a "duty to warn". This is for the purpose of apprising him of the danger and is not applicable where, as here, he is affirmatively shown to already appreciate the danger.[2]

No authority can be found for extending the duty to warn a servant of a risk to a duty to forbid him to incur it.[3]

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[1] *Johnson* v. *United States, supra,* at p. 704.

[2] "The duty of cautioning a servant rests upon the master only in case he is informed or has reason to believe that the servant is inexperienced and ignorant of the probable dangers he is about to encounter." *King* v. *Morgan* (C.C.A. 8th, 1901), 109 Fed. 446, 449.

[3] Although proof that he was forbidden may be the best evidence that he knew of the danger and voluntarily incurred it.

POINT IV

Improper denial of the defense of assumption of risk is not cured by a correct instruction on contributory negligence.

The Courts have had difficulty in exact distinctions between assumption of risk and contributory negligence. While the distinction might be difficult in border-line cases, it is clear that assumption of risk covers situations not included in any definition of contributory negligence. A seaman might, for instance, proceed with extraordinary care along a route which he knew to be inherently dangerous. He might suffer injury through no want of care from a risk he fully appreciated and voluntarily incurred. The distinction is particularly important where, as here, contributory negligence merely serves to mitigate the damages, while assumption of risk may be a complete defense.[1]

It has been said[2] that

> "* * * Whenever discrimination between them became necessary, the use of defective ways or works with notice of the defect and appreciation of the danger was held to be assumption of the risk and not contributory negligence."

As pointed out *supra* (p. 14), the Circuit Court of Appeals for the Second Circuit in the *Johnson* case reversed the District Court which had treated as contributory negligence only the voluntary selection of a route known to be dangerous.

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[1] *Seaboard Air Line R. Co.* v. *Horton* (1916), 239 U. S. 595, 601, 60 L. Ed. 458.

[2] *Yaconi* v. *Brady & Gioe, Inc.* (1927), 246 N. Y. 300, 306 (opinion by Judge Cardozo). See also *Seaboard Air Line R. Co.* v. *Horton* (1914), 233 U. S. 492, 504, 58 L. Ed. 1062; *Pryor* v. *Williams* (1920), 254 U. S. 43, 65 L. Ed. 120.

POINT V

The law is and should remain that the seaman assumes the risks that he takes unnecessarily and as a matter of his own free choice.

Rules of law should be designed to protect a seaman from injury.

The law should require a ship-owner to exercise every precaution to provide a seaworthy ship and safe equipment. The law should also require a seaman to take every reasonable precaution for his own safety.

No proper purpose is served by encouraging a seaman to take obvious risks not necessary in the performance of his duties.[1]

Seamen have a known tendeney to take such risks through a disregard for their own welfare, in order to save time or effort, or even affirmatively to show a contempt for safety devices provided for them.[2]

No rule has been found in any field of law which justifies a recovery in such a case.[3] To apply such a rule is to encourage unnecessary accidents.

Assumption of risk may well be termed a harsh rule where economic or other factors raise a doubt as to the servant's real freedom to choose. Such is not the case

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[1] *See Shearman & Redfield on Negligence* (6th Ed. 1913), Vol. I, p. 556.

[2] Cf. Bohlen, *Voluntary Assumption of Risk*, 20 Harvard Law Review 91 at 115.

[3] "It would seem to be an axiomatic rule of justice that a man should not be permitted to act voluntarily to his own detriment and then to put the burden of his folly upon another." *Assumption of Risk as a Defense where the Negligence is a Breach of a Statutory Duty*, 26 Harvard Law Review 262, 263.

where he makes a free choice between alternative working places.

The seaman, in any event, is entitled to maintenance and cure. To place on an industry a further burden of compensating for such injuries means placing that burden to some extent on the employees in the industry, including those who exercise proper care to avoid unnecessary risks.

No seaman will be denied recovery unless the Court, whose ward he is, or the jury, whose sympathy he invariably has, is satisfied that he voluntarily incurred a wholly unnecessary risk.

Conclusion

The petitioner submits that it was entitled to have the first cause of action dismissed or at least to have the jury determine whether the respondent voluntarily incurred a wholly unnecessary risk, and that the decision of the Circuit Court of Appeals is wrong and should be reversed.

Respectfully submitted,

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Supreme Court of the United States

OCTOBER TERM 1938

No. 195

SOCONY-VACUUM OIL COMPANY, INC.,
Petitioner,

against

HERBERT A. SMITH, JR.,
Respondent.

REPLY BRIEF FOR PETITIONER

LOUIS MEAD TREADWELL,
Attorney for Petitioner.

HENRY B. POTTER,
JOHN J. MANNING,
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REPLY BRIEF FOR PETITIONER

Petitioner submits in this reply brief its contentions with reference to several points raised in Respondent's brief.

POINT I

The Respondent's statement of facts is misleading.

In some instances the brief states conclusions from the Respondent's testimony as the established fact without referring to contrary testimony of Petitioner's witnesses. In several instances the brief asserts that there is no evidence of a fact clearly covered by the testimony of Petitioner's witnesses.

The opinion of the Circuit Court of Appeals contains a full and fair statement of the facts (R. 261-263).

POINT II

The distinction between defective equipment and other types of negligence is unsound.

The Respondent's brief seeks to distinguish certain of the "choice" cases which do not involve defective equipment. These cases involve negligence in failure to clean up oil[1] or failure to rig life-lines[2], each of which resulted in making a deck an unsafe place for the seaman, and failure to provide an adequate crew[3] rendering a vessel unseaworthy.

There seems no logical distinction for the purposes of the instant discussion between such acts of negligence and the negligence which permits or fails to repair defective equipment.

The significant fact in each situation is the creation through the defendant's fault of a hazard which results in injury to the seaman.

Defendant's liability depends not on the type of negligence but on the facts of negligence and proximate cause.

Similarly, assumption of risk should not depend on the type of negligence which created the hazard but rather on whether the seaman knew of the hazard and assumed it voluntarily and unnecessarily.

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1. *Holm* v. *Cities Service Transp. Co.* (C.C.A. 2nd, 1932), 60 Fed. (2d) 721.
2. *Johnson* v. *United States* (C.C.A. 2nd, 1935), 74 Fed (2d) 703.
3. *Scheffler* v. *Moran Towing and Transportation Co.* (C.C.A. 2nd, 1933), 68 Fed. (2d) 11.

POINT III

If assumption of risk is to be recognized in any case it can not logically be eliminated in cases involving defective equipment.

Unless some neglect of the defendant proximately causes the plaintiff's injury, the question of assumption of risk is not relevant. Where the seaman is hurt through no fault of the defendant he can establish no case and an affirmative defense is not called for.

Assumption of risk is only significant where it defeats recovery even though the Court has found the defendant guilty of negligence. In the *Holm* case, the Court found the defendant negligent in failing to remove the pools of oil which made the deck dangerous. In the *Johnson* case, the Court found the defendant negligent in failing to put up life-lines. In each case, however, the Court found that the seaman had no business on that particular deck at the time, knew of the danger, and wilfully selected the dangerous route instead of a known safe route.

If the defense of assumption of risk is to be retained in any case, it would be clearly illogical to deny it merely because the particular hazard involved is described as defective equipment. Just as great a hazard may be created by negligent failure to provide a firm footing, adequate lighting, proper life-lines or other safety devices, or by a neglect to provide a safe working place.

Suppose a seaman, scorning stairs, elects to jump through a hatch to a lower deck and is injured! There being no fault of the employer contributing to the injury, no question of assumption of risk as a defense arises.

But suppose that the seaman in jumping to the lower deck lands on a piece of equipment which is defective

through the employer's neglect and therefore gives way under his weight, causing him injury! Clearly the employer should not be held liable. If not, it must be because the seaman assumed the risk.

Suppose that the cook on Petitioner's vessel, preferring the atmosphere and companionship of the engine-room to that of the galley, elects to peel potatoes standing on the low pressure bearing support. Assume that he does this with full knowledge of the dangers involved, including the defective step-plate.

If the movement of the vessel throws him against the machinery, causing him injury, we have no need to discuss assumption of risk for he can establish no fault on the part of Petitioner.

But suppose that when he finishes his work and attempts to step down, he trips on the defective step-plate and is injured! His injury is just as much a proximate result of Petitioner's negligence involving defective equipment as was the Respondent's injury. It seems obvious, however, that Petitioner should not be liable for the cook's injury. The reason must be that the cook assumed the risk.

It is Petitioner's contention that the respondent had no more business climbing up on the bearing support to feel the bearing than the cook had climbing up there to peel potatoes. The distinction, if any, is surely one of degree and not of principle.

Respectfully submitted,

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